TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 111

BURTON N. PUGACH, PETITIONER,

vs.

HON. ISIDORE DOLLINGER, DISTRICT ATTORNEY OF BRONX COUNTY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 28, 1960
CERTIORARI GRANTED JUNE 27, 1960

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 111

BURTON N. PUGACH, PETITIONER,

vs.

HON. ISIDORE DOLLINGER, DISTRICT ATTORNEY OF BRONX COUNTY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Record from the United States District Court for the Southern District of New York		
Complaint	1	1
Rule to show cause	6	5
Affidavit of Burton N. Pugach in support of application for show cause order	8	6
Affidavit of Irving Anolik in opposition to motion for preliminary injunction	14	11
Affidavit of Daniel Z. Nelson in opposition to motion for preliminary injunction	17	13
Motion to dismiss complaint	19	14
Opinion, Bryan, J.	21	16
Notice of appeal	33	23
Proceedings in the United States Court of Appeals for the Second Circuit		
Opinion on motion by appellant for a stay, Medina, J.	34	24

RECORD PRESS, PRINTERS, NEW YORK, N. Y., SEPTEMBER 30, 1960

	Original	Print
Concurring opinion, Waterman, J.	41	30
Dissenting opinion, Madden, J.	43	32
Order staying state court criminal proceedings	46	34
Opinion on merits, Lumbard, J.	47	35
Concurring opinion, Waterman, J.	57	44
Dissenting opinion, Clark, J.	62	48
Judgment	70	55
Order denying petition for rehearing and granting stay	71	56
Clerk's certificate (omitted in printing)	72	56
Order granting certiorari	73	56

[fol. 1]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civ. 154-128

BURTON N. PUGACH, Plaintiff,

—against—

HON. DANIEL V. SULLIVAN, District Attorney of Bronx County and HON. STEPHEN P. KENNEDY, Police Commissioner of the City of New York, Defendants.

COMPLAINT—Filed December 23, 1959

Plaintiff, Burton N. Pugach, for his complaint herein, by his attorneys, Herbert S. Siegal, Esq. and Louis Fusco, Jr., Esq., respectfully alleges:

1. That the plaintiff is a lawyer duly admitted to practice law in all of the Courts of the State of New York.

2. That the plaintiff is a stockholder, director and vice-president of a nightclub known as Shell House, Inc., located at 150 Broadway, Island Park, Long Island, New York, and one of the owners of the liquor license issued by the State Liquor Authority of the State of New York to conduct aforesaid nightclub.

3. That defendant, Hon. Daniel V. Sullivan is the duly elected District Attorney of Bronx County, State of New York.

4. That the defendant Hon. Stephen P. Kennedy is the Police Commissioner of the City of New York.

5. That on or about June 15th, 1959, the defendants, their agents, servants and or employees applied for and did secure an order from the Supreme Court of the State of New York permitting them to tap the wires of the plaintiff, Burton N. Pugach.

[fol. 2] 6. That on or about June 15th, 1959, and thereafter, the defendants, their agents, servants and/or employees did tap the wires of Burton N. Pugach.

7. That in the course of the actuation of the said illegal wire taps, defendants obtained certain information via the telephone.

8. That such acts are illegal, being prohibited by the Laws of the United States of America, and more particularly by Section 605 of the Federal Communications Act of 1934, the pertinent part of which reads as follows:

> "No person, not being authorized by the sender, shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication. . . ."

9. That as a result of the aforesaid illegal wire taps, defendants divulged the contents and information obtained through said illegal wire taps to the Grand Jury sitting in and for the County of Bronx, State of New York, and also permitted persons to testify before the Grand Jury with respect to the wire tap conversations, and divulged said wire taps and information obtained as a result of said wire taps to the Press and to other persons.

10. That as a result of the said illegal wire taps and illegal disclosures of said wire taps before the Grand Jury, and information obtained as a result of said wire taps, the Grand Jury indicted the plaintiff, Burton N. Pugach, together with defendants Heard Harden, Walter McMillian and Al Smith Newkirk in two indictments, Nos. 1331/59 and 1332/59, filed on the 10th day of November, 1959, charging the defendants with the crimes of violating Section 1897 P.L., subd. 5-a (Felony) (Indictment No. 1331/59) and Burglary in the Second Degree, Maiming, Assault in the Second Degree and Conspiracy (Indictment No. 1332/59).

11. The plaintiff herein, together with the other defen-[fol. 3] dants pleaded not guilty to the said indictments on the 10th day of November, 1959.

12. That on the 16th day of December, 1959, the District Attorney of Bronx County moved for an order that a

Special Jury be drawn for the trial of the indictment herein (No. 1332/59) now pending in the County Court of Bronx County against the plaintiff herein and the above named other defendants.

13. That on the 17th day of December, 1959, the Hon. Eugene G. Schulz, County Judge, Bronx County, State of New York, granted said motion, ordering that a Special Jury be drawn for the trial of the indictment herein (No. 1332/59) now pending in the County Court of Bronx County against the plaintiff herein and the above-named other defendants, and setting the case down for trial for January 7th, 1960.

14. Upon information and belief, it is alleged that the defendants intend to use the evidence obtained by use of the aforesaid illegal wire taps and the information obtained through the illegal use of the aforesaid wire taps upon the trial of the aforementioned indictments.

15. Upon information and belief that the Law of the State of New York is such that the said courts will accept and utilize evidence illegally and improperly obtained notwithstanding the Federal Law as contained in Section 605 of the Federal Communications Act of 1934, and consequently, plaintiff cannot seek or obtain any relief or protection against the illegal acts of the defendants.

16. That a conviction upon the trial of said indictments upon said illegal evidence obtained through the use of illegal wire taps or as a result of information obtained through the use of illegal wire taps, will cause the plaintiff irreparable damage in the loss of his license to practice law in the State of New York and of his liquor license is [fol. 4] sued to him by the State Liquor Authority of the State of New York, besides subjecting him to loss of his personal liberty.

17. That plaintiff, Burton N. Pugach is a citizen of the United States of America; resides within the jurisdiction of the United States District Court for the Southern District of New York; the indictments referred to herein are pending in the County Court of Bronx County, which County

Court is within the jurisdiction of the United States District Court for the Southern District of New York; the District Attorney of Bronx County is within the jurisdiction of the United States District Court for the Southern District of New York. That the proprietory interest of the plaintiff in his license to practice law is of the value of more than Ten Thousand ($10,000.00) Dollars. That the proprietory interest of the plaintiff in his liquor license issued to him by the State Liquor Authority of the State of New York is of the value of more than Ten Thousand ($10,000.00) Dollars.

18. Upon information and belief, the United States District Court for the Southern District of New York has jurisdiction in all cases to provide for a citizen of the United States all his rights, privileges and protection conferred upon the said citizen by the Laws of Congress.

19. That plaintiff has no adequate remedy at law.

20. That the defendants, or either of them, have in their possession, or in the possession of their agents, servants and/or employees the original wire tap recordings, illegally obtained as aforesaid.

21. That all of the crimes charged against the plaintiff, Burton N. Pugach emanated from and are the result of the illegal wire tapping as hereinbefore alleged.

[fol. 5] Wherefore, plaintiff respectfully requests that this Court prohibit and enjoin Hon. Daniel V. Sullivan, District Attorney of the County of Bronx, Hon. Stephen P. Kennedy, Police Commissioner of the City of New York, and their agents, servants and/or employees from proceeding against the plaintiff, Burton N. Pugach upon the indictments, Nos. 1331/59 and 1332/59, filed in the County Court, Bronx County on the 10th day of November, 1959 on any grounds in which they may use wire tapping evidence, or on any grounds or investigations resulting from or instituted as a result of the aforesaid illegal wire taps, and that the Court further order and decree that the defendants, or either of them, or their agents, servants and/or employees, be directed to turn over to the plaintiff any and all wire taps and recordings of the plaintiff, Burton N. Pugach.

Dated: New York, December 22, 1959.

Herbert S. Siegal, Esq. & Louis Fusco, Jr., Esq., Attorneys for Plaintiff, Burton N. Pugach, Office and P.O. Address, 391 East 149th Street, Bronx 55, New York.

[fol. 6] [File endorsement omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

RULE TO SHOW CAUSE—December 23, 1959

Upon the complaint herein duly verified the 22nd day of December, 1959 and the annexed affidavit of Burton N. Pugach, sworn to the 22nd day of December, 1959 from which it appears, among other things, that the defendants above-named obtained certain information and evidence by an allegedly illegal wiretap, and that the defendants intend to use such information and evidence in a trial upon indictments Nos. 1331/59 and 1332/59 in the County Court, Bronx County, commencing on January 7th, 1960, and that the use thereof would result in irreparable loss and injury to the plaintiff because his said licenses are valuable property rights, let the defendants, Hon. Daniel V. Sullivan, District Attorney of Bronx County and Hon. Stephen P. Kennedy, Police Commissioner of the City of New York show cause before me or a Judge sitting at Term for Motions at the courthouse located at Foley Square, Borough of Manhattan, City of New York, on the 29th day of December, 1959, at 10:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard why an order should not be made enjoining and restraining the defendants, Hon. Daniel V. Sullivan, District Attorney of Bronx County and Hon. Stephen P. Kennedy, Police Commissioner of the City of New York, their agents, servants and/or em-
[fol. 7] ployees from using said information and evidence upon the trial of the aforesaid indictments; and

* * * * * * *

Let service of a copy of this order and the papers upon which it is predicated upon Hon. Daniel V. Sullivan, District Attorney of Bronx County and Hon. Stephen P. Kennedy, Police Commissioner on or before 5 o'clock in the afternoon on the 24th day of December, 1959 be deemed sufficient.

Dated: New York, N. Y. the 23rd day of December, 1959.

Frederick v.P. Bryan, U.S. Dist. Judge.

[fol. 8]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT IN SUPPORT OF APPLICATION FOR SHOW CAUSE ORDER—December 23, 1959

State of New York,
City of New York,
County of Bronx, *ss.*:

Burton N. Pugach, being duly sworn, deposes and says:

That he is a citizen of the United States of America; resides in the County of Westchester, State of New York; and maintains an office for the practice of law at 349 East 149th Street, in the Borough of Bronx, City and State of New York.

That your deponent was admitted to practice law in the State of New York on June 21st, 1950, in all of the courts of the State of New York.

That your deponent holds and is possessed of a valuable property right, to wit; a liquor license issued by the State Liquor Authority of the State of New York to sell liquor at a nightclub known as the Shell House, located at 150 Broadway, Island Park, Long Island, New York.

That this license was issued for valuable consideration by the State Liquor Authority of the State of New York, and is at present extremely valuable from both a financial

and monetary point of view and constitutes a property right.

[fol. 9] That your deponent, together with Heard Harden, Walter McMillian and Al Smith Newkirk were indicted in two indictments, Nos. 1331/59 and 1332/59 by the Grand Jury of Bronx County, City and State of New York, on the 10th day of November, 1959, charging your deponent with the crime of violating Section 1897 P.L., subd. 5-a (Felony) (Indictment No. 1331/59) and charging your deponent, together with the other defendants with the crimes of Burglary in the Second Degree, Maiming, Assault in the Second Degree and Conspiracy (Indictment No. 1332/59).

That upon information and belief, on or about June 15th, 1959, the defendants, their agents; servants and/or employees applied for and did secure an order from the Supreme Court of the State of New York, permitting them to tap the wires of your deponent.

That upon information and belief on or about June 15th, 1959, and thereafter, the defendants, their agents, servants and/or employees did tap the wires of your deponent.

That upon information and belief, in the course of the actuation of the said illegal wire taps, defendants obtained certain information via the telephone of your deponent.

That as a result of the aforesaid illegal wire taps, defendants divulged the contents and information obtained through said illegal wire taps to the Grand Jury sitting in and for the County of Bronx, State of New York, and also permitted persons to testify before the Grand Jury with respect to the wire tap conversations, and divulged said wire taps and information obtained as a result of said wire taps to the Press and to other persons.

That your deponent, together with the other defendants pleaded not guilty to the said indictments on the 10th day of November, 1959.

[fol. 10] That on the 16th day of December, 1959, the District Attorney of Bronx County moved for an order that a Special Jury be drawn for the trial of the indictment herein (No. 1332/59) now pending in the County Court of Bronx County against your deponent and the above-named other defendants.

That on the 17th day of December, 1959, the Hon. Eugene G. Schulz, County Judge, Bronx County, State of New York, granted said motion, ordering that a Special Jury be drawn for the trial of the indictment herein (No. 1332/59) now pending in the County Court of Bronx County against your deponent and the above-named other defendants, and setting the case down for trial for January 7th, 1960.

That your deponent has reason to, and verily believes that at the said trial upon said indictments before the County Court, Bronx County, the said District Attorney of Bronx County, State of New York and the Police Commissioner of the City of New York intend to submit evidence of certain telephone conversations and information received as a result of the aforesaid illegal wire taps.

That such acts are illegal, being prohibited by the Laws of the United States of America, and more particularly by Section 605 of the Federal Communications Act of 1934, the pertinent part of which reads as follows:

> "No person, not being authorized by the sender, shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication. * * *"

That your deponent is informed that the acquisition of these wire tap conversations, and the knowledge obtained as a result of the wire tapping of your deponent's telephone is illegal and improper and in direct contravention of an absolute prohibition thereof of a Statute duly passed and adopted by the Congress of the United States of America. [fol. 11] That if the District Attorney of Bronx County and the Police Commissioner of the City of New York are permitted to utilize this evidence and proceed on the basis of such evidence upon the trial of the indictments referred to herein, your deponent may suffer the loss of his liquor license which had been duly issued to him by the State Liquor Authority of the State of New York, which license constitutes a very valuable monetary right in your deponent, well over the value of Ten Thousand ($10,000.00) Dollars; and as a further result of this improper acquisition of the evidence through the illegal wire taps as aforesaid, the plaintiff may suffer the loss of his license to

practice law in the State of New York, which license constitutes a very valuable monetary right of your deponent; and as a further result of the improper acquisition of this illegal evidence, the plaintiff may suffer the loss of his personal freedom.

That your deponent, on December 17th, 1959, received a communication from the State Liquor Authority reading as follows:

> "In view of the serious nature of the offenses upon which the indictment is based, it is the Authority's position that until such charge is disposed of, you may not be permitted upon licensed premises."

This is a positive indication that your deponent has already suffered irreparable damage in view of the fact that he may not enter upon the licensed premises and thus protect his interests in the management and/or control of the said business.

That as a result of the illegal wire taps as aforesaid the confidential and privileged communications between lawyer and client have been violated an innumerable number of times inasmuch as your deponent has an extensive law practice and receives and makes a great number of calls [fol. 12] daily to and from clients pertaining to legal business which your deponent is handling for them. This is another instance of irreparable damage to your deponent and to his clients, due to illegal wire tapping and disclosures, both in violation of Section 605 of the Federal Communications Act of 1934.

That your deponent cannot apply for redress in the State Courts of the State of New York, and cannot raise the objections set forth herein to the Courts of the State of New York at the trial of these indictments by virtue of the fact that the Courts of the State of New York do not recognize any prohibition against this acquisition of evidence or testimony in an illegal and improper manner, and permit the use thereof against a citizen of the United States of America in the State of New York.

That your deponent verily believes that unless the proceedings and trial before the County Court of Bronx

County are stayed until the determination of this action which has this date been instituted, the proceedings and trial in the County Court of Bronx County will proceed on January 7th, 1960, and as a result of the illegal wire taps and information secured as a result of said illegal wire taps, your deponent may be convicted on said indictments and as a result, your deponent will lose valuable property rights, to wit; the liquor license heretofore issued to him by the State Liquor Authority of the State of New York and his license to practice law in the State of New York; and as a further result, may lose his personal freedom; and as a result thereof, your deponent will suffer irreparable damage.

That no previous application has been made for the relief requested herein.

[fol. 13] Wherefore, deponent respectfully requests that the annexed order to show cause be signed, staying the trial and all proceedings under the indictments referred to herein in the County Court of Bronx County, State of New York, until the hearing and determination of a motion for a stay of all proceedings by the District Attorney of Bronx County and the Police Commissioner of the City of New York.

Burton N. Pugach

Sworn to before me this 22nd day of December, 1959.

Herbert S. Siegal, Notary Public, State of New York, No. 03-3657600, Qualified in Bronx County, Commission Expires March 30, 1961.

[fol. 14] [File endorsement omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF IRVING ANOLIK IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION—Filed January 13, 1960

State of New York,
County of Bronx, *ss.*:

Irving Anolik, being duly sworn says:

I am an attorney at law admitted to practice in the State of New York and before the bar of this Court. Your deponent is also an Assistant District Attorney in the office of the District Attorney of Bronx County and I have been assigned to the above-entitled matter.

This affidavit is made in opposition to plaintiff's application for an order enjoining and restraining the defendants from using "information and evidence" allegedly obtained by the use of wiretap devices.

Wiretapping, pursuant to court order is authorized in the State of New York by Article 1, Section 12, N.Y. Const., and Section 813-a, Code Crim. Pro.

At the outset it is obvious that this Court has no jurisdiction to entertain the plaintiff's application or action which has been commenced. There has been no exhaustion of state remedies and as a matter of fact there is no indication whatsoever that the prosecution has even attempted to introduce this material into evidence. It re-
[fol. 15] quires no citation of authority to prove that the Federal Courts cannot prescribe rules for admission of evidence in State Courts.

In Schwartz v. Texas, 344 U.S. 199, 73 S.Ct. 232, the Supreme Court of the United States held that a state policy of admitting evidence having probative force, even though obtained illegally, does not contravene Federal law.

In commenting upon the *Schwartz* case, supra, Chief Justice Warren in Benanti v. United States, 355 U.S. 96, 101, 78 S.Ct. 155, 158, declares:

> "The rationale of that case is that despite the plain prohibition of Section 605 [47 U.S.C.A. § 605], due regard to federal-state relations precluded the conclusion that Congress intended to thwart a State rule of evidence in the absence of a clear indication to that effect".

Assuming, arguendo, that the wiretaps in this case were illegally obtained (which is not the situation herein), it would not be grounds for reversal under New York law (People v. Richter's Jewelers, 291 N.Y. 161, People v. Defore, 242 N.Y. 13, cert. denied 270 U.S. 657).

In People v. Variano, 5 N.Y. 2d 391 and People v. Broady, 5 N.Y. 2d 500, the New York Court of Appeals has held that Section 605 of the Federal Communications Act does not preclude State Courts from admitting wiretap evidence.

In the event the State of New York through the District Attorney of Bronx County ultimately offers wiretap evidence in the criminal proceedings now pending in Bronx County, the plaintiff herein, Burton Pugach, has adequate remedies including the right of an appeal. Should his relief be denied in the trial and Appellate Courts of the State of New York, then Pugach would be in a position to seek a writ of certiorari from the Supreme Court of the United States and possibly a writ of habeas corpus in this Court. What he is attempting to do now is to circumvent an [fol. 16] appeal under State Court procedure and to put this Court in a position of interfering with the conduct of a state trial—a matter which is clearly beyond this Court's jurisdiction.

The papers in connection with the instant matter were served upon the District Attorney on December 24th and the intervening holiday has precluded the preparation of elaborate briefs. The defendants submit however that it is not necessary to submit any elaborate citations of authority to support its contention that plaintiff's relief must be

denied in all respects and his complaint dismissed summarily.

Wherefore, defendants request that plaintiff's requested relief be denied in all respects and the complaint in the instant action be dismissed.

Irving Anolik

Sworn to before me this 28 day of December, 1959.

William J. Conran, Notary Public State of New York, No. 03-0737000, Qualified in Bronx County, Commission Expires March 30, 1961.

[fol. 17] [File endorsement omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF DANIEL Z. NELSON IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION—Filed January 13, 1960

State of New York,
County of New York, *ss.*:

Daniel Z. Nelson, being duly sworn, deposes and says:

I am an Assistant Corporation Counsel of the City of New York and am in charge of this proceeding in the representation of defendant-respondent Stephen P. Kennedy, Police Commissioner of the City of New York, and am fully familiar with all the facts in this proceeding. This affidavit is being submitted to relate to the Court a conversation I have had this date with Walter C. Schmidt, a Deputy Commissioner of the State Liquor Authority, in connection with the plaintiff-petitioner's interest in a night club known as the Shell House.

I have been informed by Commissioner Schmidt that Mr. Pugach owns three and one-half shares of a total of twenty shares comprising the corporation which owns the Shell House. That Mr. Pugach is not the owner and pos-

sessor of a liquor license but that the corporation owning [fol. 18] the night club is the possessor of the liquor license.

That on or about December 9, 1959, Mr. Pugach sent a letter to the State Liquor Authority indicating that he had had a dispute with his fellow stockholders as to whether he should enter the premises of the night club in view of the fact that he had been indicted for committing a crime, and requested an opinion of the Authority.

As a result of this communication to the State Liquor Authority the said Authority issued an opinion to Mr. Pugach on December 17, 1959, advising him that he may not be permitted upon the licensed premises.

That the said notification was prompted only by Mr. Pugach's request for an opinion, and the State Liquor Authority has not taken any affirmative action with respect to Mr. Pugach or the Shell House night club.

From the foregoing it is obvious that Mr. Pugach has not suffered any irreparable damage or any damage at all as a result of any wire-tapping evidence.

Wherefore, it is respectfully urged that the petitioner's application for a temporary injunction be denied in all respects.

Daniel Z. Nelson

Sworn to before me this 29th day of December, 1959.

Benjamin J. Stern, Notary Public State of New York, No. 03-3547690, Qualified in Bronx County, Commission Expires March 30, 1961.

[fol. 19] [File endorsement omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

MOTION TO DISMISS COMPLAINT—Filed January 13, 1960

The respondent Stephen P. Kennedy, the Police Commissioner of the City of New York moves the Court as follows:

1. To dismiss the proceedings because the petition fails to state a claim against respondents upon which relief can be granted.

2. To dismiss the proceeding on the ground that the petitioner seeks to supersede State rules of evidence in a Federal court.

3. To dismiss the proceeding on the ground that equitable relief may not be granted by a Federal court in that petitioner has not shown that he has been or will be irreparably damaged.

4. To dismiss the proceeding on the ground that the petitioner has an adequate remedy at law.

[fol. 20] 5. To dismiss the proceeding on the ground that the Court lacks jurisdiction.

6. To dismiss the proceeding on the ground that this proceeding is premature.

Signed: Charles H. Tenney, Attorney for Respondent Stephen P. Kennedy, Police Commissioner of the City of New York, Office & P.O. Address: Municipal Building, Borough of Manhattan, New York 7, N.Y.

To: Herbert S. Siegal, Esq., Attorney for Plaintiff, 391 East 149th Street, Borough of The Bronx, City of New York.

Please Take Notice that the undersigned will bring the above motion on for hearing before this Court at Term for Motions at the United States Court House, Foley Square, City of New York, on the 29th day of December, 1959, at 2 P.M., in the afternoon of that day, or as soon thereafter as counsel can be heard.

Signed: Charles H. Tenney, Attorney for Respondent Stephen P. Kennedy, Police Commissioner of the City of New York, Office & P.O. Address: Municipal Building, Borough of Manhattan, New York 7, N.Y.

[fol. 21]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil 154-128

BURTON N. PUGACH, Plaintiff,

—against—

HON. DANIEL V. SULLIVAN, District Attorney of Bronx County and HON. STEPHEN P. KENNEDY, Police Commissioner of the City of New York, Defendants.

Appearances:

Herbert S. Siegal, Esq., New York City, and Louis Fusco, Jr., Esq., New York City, Attorneys for Plaintiff.

Daniel V. Sullivan, Esq., District Attorney of Bronx County, Irving Anolik, Esq., Assistant District Attorney, Bronx County, Of Counsel.

Charles H. Tenney, Esq., Corporation Counsel, Attorney for Respondent Stephen P. Kennedy, Rose Schneph, Esq., Daniel Z. Nelson, Esq., Of Counsel.

OPINION—January 13, 1960

Bryan, District Judge:

Plaintiff Pugach is under two indictments returned by the [fol. 22] Grand Jury of Bronx County charging him with felonious possession of firearms, burglary, maiming, assault, and conspiracy. He is scheduled to stand trial on these indictments on January 18, 1960 in the County Court of Bronx County.

He claims that his telephone was tapped by agents of the defendant law enforcement officers, in violation of § 605 of the Federal Communications Act, 47 U.S.C. § 605; that the contents of telephone conversations obtained by such wire taps, and information secured as a consequence thereof, were divulged to the Grand Jury and formed the basis for

the indictments against him; and that evidence as to these communications and the information so secured will be offered against him by the prosecution at the trial. He therefore brings this action to enjoin the Bronx County District Attorney and the New York City Police Commissioner and their agents and servants from divulging the existence or contents of any telephone communications which were obtained through the tapping of his telephone and to enjoin the introduction at the trial of all evidence obtained as a result of the wiretaps.

Jurisdiction lies under 28 U.S.C. § 1343 and 42 U.S.C. 1983. See Douglas v. City of Jeannette, 319 U.S. 157; Hague v. CIO, 307 U.S. 496. See, also, Burt v. City of New York, 2 Cir., 156 F. 2d 791.

[fol. 23] Plaintiff now moves for the injunctive relief which he seeks in his complaint. The defendants in turn make what are in effect cross-motions to dismiss the complaint for failure to state a claim upon which relief can be granted.

It is not disputed that an ex parte order of the New York Supreme Court was obtained by the District Attorney of Bronx County pursuant to § 813-a of the New York Code of Criminal Procedure, purporting to authorize the tapping of plaintiff's telephone, and that his telephone was tapped by state law enforcement officers acting under such order. Nor is it denied that the indictments in question were in substantial part based on telephone conversations so obtained, and information secured as a result. It appears highly likely that the prosecution will use such evidence against plaintiff on the trial of the indictments. Plaintiff claims that the use of this evidence at the trial will cause him irreparable injury against which he has no protection except through this court.

The issue before me is (1) whether this court can or should enjoin the divulgence by witnesses at a New York State criminal trial of the contents of telephone communications obtained through wiretapping in violation of § 605 of the Federal Communications Act, though pursuant to the Constitution and statutes of the State of New York, and (2) whether the presentation of evidence secured

[fol. 24] through leads obtained by such wiretaps should also be enjoined.[1]

Questions arising from the tapping of telephones in aid of enforcement of the criminal law, the disclosure of telephone communications obtained by wiretapping, and the admissibility of evidence secured from leads so obtained have frequently been before the courts in recent years.[2]

In Olmstead v. United States, 277 U.S. 438, the Supreme Court held, four Justices dissenting, that the tapping of [fol. 25] telephones does not violate the Fourth or Fifth Amendments to the Constitution.[3] That decision still holds.

Six years after *Olmstead* Congress passed the Federal Communications Act,[4] Section 605 of which provides,[5] with respect to communications by wire or telephone, that

---

[1] The complaint also claims that the violation of § 605 has affected substantial property rights of the plaintiff, as well as his personal rights. It is alleged that he is a member of the New York bar, that some of the conversations which were intercepted were privileged communications between himself and his clients, that a conviction upon the trial of these indictments will cause him to lose his valuable license to practice law in New York, and that it will also jeopardize a liquor license owned by a corporation of which he is a stockholder and in which he has a substantial property interest. However, there is no claim that his property rights will be affected by any threatened acts of the defendants apart from their testimony at the trial and the possible resulting conviction. The relief sought here is confined to the presentation of evidence at the criminal trial about to be held. The allegations as to property rights which might be affected by a conviction at that trial do not expand the issues here beyond those which I have defined above.

[2] The problem has also been extensively discussed in the law reviews. For two articles discussing the underlying philosophical and law enforcement problems, as opposed to the strictly legal problems, raised by wiretapping, see Rogers, The Case for Wiretapping, 63 Yale L.J. 792 (1952); Westin, The Wiretapping Problem: An Analysis and a Legislative Proposal, 52 Columbia L. Rev. 165 (1952).

[3] Justices Holmes, Brandeis, Stone and Butler dissented. See, also, the dissenting opinions of Justices Frankfurter and Douglas in *On Lee v. United States*, 343 U.S. 747.

[4] 48 Stat. 1064.

[5] 47 U.S.C. § 605.

"* * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * * no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: * * *."

Thereafter, in Nardone v. United States, 302 U.S. 379, and 308 U.S. 338, the Supreme Court held that all evidence obtained from the tapping of telephones by federal agents is inadmissible in the federal courts. Such evidence includes not only actual telephone conversations so obtained but all evidence secured as a result of information or leads [fol. 26] therefrom.[1] It makes no difference whether the telephone communications are interstate or intrastate. Weiss v. United States, 308 U.S. 321.

However, in Schwartz v. Texas, 344 U.S. 199, the Supreme Court held that evidence of this nature was admissible in the state courts where it had been obtained by state agents, and that its admission was not a ground for reversal of a state court conviction. The rule excluding, in federal proceedings, evidence obtained and sought to be divulged in violation of § 605 was held to be a rule of evidence only. The court found that Congress, by forbidding the interception and divulgence of telephone communications, did not intend to impose the federal exclusionary rule of evidence[2] on the state courts, and that the states

---

[1] This was a logical extension of the "fruits of the poisonous tree" doctrine first enunciated in *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385.

[2] First established in *Weeks* v. *United States*, 232 U.S. 383.

were free to make and apply their own rules of evidence on this subject matter.

In Benanti v. United States, 355 U.S. 96,* the question [fol. 27] presented was whether evidence obtained as a result of wiretapping by state law enforcement officers, without participation by federal authorities, was admissible in a federal court. The court was thus faced with a choice between the results reached in *Nardone* and *Schwartz*. It held that the state agents, in committing the wiretap, were violating the federal law even though they were acting in accordance with the Constitution and statutes of the State of New York which permit a telephone tap under an ex parte order issued by a state court judge. The court refused to permit any evidence obtained through wiretapping in violation of § 605 to be admitted in federal criminal proceedings. Under the comprehensive scheme of interstate regulation embodied in the Federal Communications Act and the public policy underlying § 605 (at pp. 105-6)

> "* * * Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy."

The Federal Communications Act not only prohibits the tapping of telephones but Section 501 of the Act also makes such interception and divulgence of telephone communications a federal crime. (47 U.S.C. § 501.) The violation of § 605 may also give rise to a civil action for damages. See Reitmeister v. Reitmeister, 2 Cir., 162 F. 2d 691, 694.

[fol. 28] Since the *Benanti* case there is little doubt that state officers who engage in telephone wiretaps and divulge the contents of communications so obtained not only are acting in violation of the federal statute but are committing a federal crime. The fact that they act in aid of law enforcement and under purported authority of state Constitution and statutes does not make their acts any less a violation of federal law. This was recognized by the New York Supreme Court in In Matter of Incaption of Telephone Communications, 9 Misc. 2d 121, 170 N.Y.S. 2d 84. There Mr. Justice Hofstadter held that he could not law-

* Extensively discussed in 57 Columbia L. Rev. 1159 (1957).

fully issue orders pursuant to § 813-a of the New York Code of Criminal Procedure authorizing telephone wiretaps by state law enforcement officers since, in the light of the *Benanti* case, such wiretaps were in violation of federal law.

However, it does not follow that plaintiff is entitled to an injunction against the introduction of evidence so obtained at a state criminal trial. As was made abundantly clear in Schwartz v. Texas, *supra*, the question of whether such evidence is admissible in a state criminal trial has been left for the states to determine. Congress, by enacting § 605, did not intend "to thwart a state rule of evidence". The policy of the State of New York, as reaffirmed by its Court of Appeals subsequent to *Benanti*, is that wiretap evidence even though illegally obtained is admissible in a [fol. 29] state criminal trial. People v. Variano, 5 N.Y. 2d 391.

Cases dealing with the admissibility in state criminal prosecutions of evidence obtained by unlawful search and seizure arising under the Fourth and Fourteenth Amendments to the Constitution furnish a parallel here. Wolf v. Colorado, 338 U.S. 25, held that the admission of such evidence in a prosecution in a state court for a state crime was not forbidden and the court refused to reverse a state court conviction because such evidence had been received.[9]

In Stefanelli v. Minard, 342 U.S. 117, the petitioner appealed from a denial by the federal district court of an injunction against the use in pending state criminal proceedings of the fruits of an unlawful search and seizure by the New Jersey State Police. It was held that the federal courts should refuse to intervene in state criminal proceedings to suppress the use of evidence even when secured by unlawful search and seizure.[10]

---

[9] See, also, *Irvine* v. *California*, 347 U.S. 128, narrowly limiting *Rochin* v. *California*, 342 U.S. 165.

[10] The Civil Rights Act "'should be construed so as to respect the proper balance between the States and the federal government in law enforcement,' *Screws* v. *United States*, 325 U.S. 91, 108," and is "'not to be used to centralize power so as to upset the federal system.' Collins v. Hardyman, 341 U.S. 651, 658." See, also, *Douglas* v. *City of Jeannette*, 319 U.S. 157.

[fol. 30] As Mr. Justice Frankfurter, writing for the court said:[11]

> "The consequences of exercising the equitable power here invoked are not the concern of a merely doctrinaire aloofness to protect the proper sphere of the States in enforcing their criminal law. If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution."

The same considerations which impelled the court in *Stefanelli* to refuse to exercise its equitable powers to interfere in a state criminal proceeding also apply in the [fol. 31] case at bar.[12] There is nothing here which removes this case from the orbit of *Stefanelli*. It is true that the testimony of state officers and agents as to actual telephone conversations which had been intercepted would in itself constitute divulgence in criminal violation of the express prohibitions of § 605. But even if it were established

---

[11] 355 U.S. at 123-124. It may be noted that a footnote cites by way of illustration cases, among others, where the lower courts have refused to intervene by injunction upon a claim that state officers had violated the federal wiretapping statute. See *Maguire* v. *Amrein*, 101 F. Supp. 414; *Hoffman* v. *O'Brien*, 88 F. Supp. 490. But see *Burack* v. *State Liquor Authority*, D.C.E.D.N.Y., 160 F. Supp. 161.

[12] *Voci* v. *Storb*, 3 Cir., 235 F. 2d 48.

that such divulgence will occur (and it has not been affirmatively shown that it will) this would not justify a departure from the principles of *Stefanelli*. Schwartz v. Texas, *supra*, made it plain that § 605 does not operate to exclude such evidence in state court proceedings even though "the introduction of the intercepted communications would itself be a violation of the statute". This is "simply an additional factor for the state to consider in formulating a rule of evidence for use in its own courts. Enforcement of the statutory prohibition in § 605 can be achieved under the penal provisions of § 501".[1] As I have pointed out, plaintiff may also have a remedy in civil damages. See Reitmeister v. Reitmeister, *supra*.

Plaintiff is not entitled to injunctive relief from this court. The federal courts will not exercise their equity powers to disturb the delicate balance of our federal system by interference with or embarrassment of criminal proceedings in the state courts.

Plaintiff's motion for a preliminary injunction is there- [fol. 32] fore in all respects denied and the motions of the defendants to dismiss the complaint are granted.

It is so ordered.

Frederick v.P. Bryan
U.S.D.J.

Dated: New York, N.Y., January 13, 1960.

[fol. 33] [File endorsement omitted]

DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL—Filed January 20, 1960

To: Hon. Daniel V. Sullivan and Hon. Stephen P. Kennedy:

The plaintiff, Burton N. Pugach, hereby gives notice to the above-named parties of his appeal filed herein on this

---

[1] 344 U.S. at 201.

19th day of January, 1960, to the United States Circuit Court of Appeals for the Second Circuit, from a Judgment of the United States District Court for the Southern District of New York entered on the 13th day of January, 1960.

Dated: January 19th, 1960.

Herbert S. Siegal & Louis Fusco, Jr., Esqs., Attorneys for Plaintiff, Office & P.O. Address, 391 East 149th Street, Borough of Bronx, City of New York.

To:

Clerk of the District Court of the United States, Southern District of New York, Foley Square, New York, N. Y.

Hon. Isidore Dollinger, District Attorney—Bronx County, 851 Grand Concourse, Bronx, N. Y.

Hon. Charles H. Tenney, Corporation Counsel, Municipal Building, New York 7, N. Y.

[fol. 34]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

October Term, 1959

(Motion Argued February 1, 1960)

BURTON N. PUGACH, Petitioner-Appellant,

—against—

HONORABLE ISIDORE DOLLINGER, District Attorney of Bronx County and
HONORABLE STEPHEN P. KENNEDY, Police Commissioner of the City of New York, Respondent-Appellees.

Before: Medina and Waterman, Circuit Judges, and Madden, Judge, United States Court of Claims.*

---

* Sitting by designation pursuant to the provisions of 28 U. S. C. §291(a).

OPINION ON MOTION BY APPELLANT FOR A STAY
—February 11, 1960

Herbert S. Siegel and Louis Fusco, Jr., Bronx, New York, for petitioner-appellant.

[fol. 35] Irving Anolik, Assistant District Attorney, Bronx County, New York (Isidore Dollinger, District Attorney, Bronx County, and Alexander E. Scheer, Assistant District Attorney, Bronx, New York, on the brief), for respondent-appellees.

MEDINA, *Circuit Judge*:

Burton N. Pugach and others were indicted by the Grand Jury of Bronx County, New York, charged with the crimes of burglary in the second degree, maiming, assault in the second degree and conspiracy. Another indictment charges Pugach with felonious possession of firearms. Proceedings are pending in the County Court of Bronx County and we are informed by the Assistant District Attorney in charge that "it will not be possible to delay this case beyond February 15."

The present action was brought in the United States District Court for the Southern District of New York against the District Attorney of Bronx County and the Police Commissioner of New York City for a permanent injunction restraining the use by them and their agents and employees on the forthcoming trial of certain wiretap evidence. A motion for a preliminary injunction was denied and the complaint was dismissed. Pugach appealed to this Court from the order denying the preliminary injunction and dismissing his complaint. The matter comes before us on a motion for a stay pending the hearing of the appeal.

It is not disputed that defendants or their agents on June 15, 1959 procured an order of the Supreme Court of the State of New York permitting Pugach's telephone wires to be tapped, that they were tapped and that the contents of the wiretaps were divulged to the Grand Jury. It is also asserted and not denied that the wiretaps were divulged

[fol. 36] "to the press and to other persons." We agree with the statement by the District Judge: "It appears highly likely that the prosecution will use such evidence against plaintiff on the trial of the indictments." Indeed, the position of the District Attorney on this motion is not that no wiretap evidence will be used on the trial but rather that the order permitting the wiretap was authorized by Article I, Section 12 of the New York Constitution, by Section 813a of the New York Code of Criminal Procedure, and the evidence thereof held to be admissible in criminal prosecutions by the recent decisions of the New York Court of Appeals in *People* v. *Variano*, 1959, 5 N. Y. 2d 391, and *People* v. *Broady*, 1959, 5 N. Y. 2d 500; and he further contends that a federal court not only should not interfere with the use of such wiretap evidence but is without power or jurisdiction to do so. Under these circumstances we see no reason to doubt that the wiretap evidence will be used at the trial unless we take action to prevent such use.

Pugach's argument is: that Section 605 of the Federal Communications Act makes it a federal crime to tap a telephone and "divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication"; that defendants or their agents are about to commit this federal crime by further divulging and offering the wiretaps in evidence at the trial; that the Supreme Court has in effect held in *United States* v. *Benanti*, 1957, 355 U. S. 96, that the constitutional and legislative authorization of wiretaps by the State of New York is illegal and void; that if the evidence is received at the trial and Pugach is convicted he will be wholly without remedy, since under *Schwartz* v. *Texas*, 1952, 344 U. S. 199, which is still in effect, the evidence will be admissible under the New York rules of evidence, even though illegally obtained, and his conviction will not be reversed. He also claims that the result of such violations of federal law will [fol. 37] deprive him of his liquor license and his license to practice law. Pugach argues that, unless we grant the injunctive relief he prays, defendants and their agents will go ahead and violate the federal statute with impunity, shielding themselves behind a constitutional and legislative scheme of the State of New York that has been held by

the Supreme Court to be invalid. This is a powerful argument and we have been unable to find any satisfactory answer to it.

It is interesting to note that on the same day the motion now under consideration was argued we also heard argument in *United States ex rel. Graziano* v. *McMann*, another wiretapping case. The regular New York procedure had been followed, the wiretap evidence was received at the trial and Graziano was convicted. The judgment of conviction was affirmed by the Appellate Division, 1957, 3 A. D. 2d 1019, and by the Court of Appeals, 1958, 4 N. Y. 2d 881. A motion to amend the remittitur to note that a question arising under the federal Constitution had been argued and decided was denied, 1958, 4 N. Y. 2d 1046, although Graziano had objected to the wiretap evidence and claimed it should not have been received as it violated the federal statute against intercepting and divulging telephone messages, and the Supreme Court denied certiorari, 1958, 358 U. S. 851. Thereafter Graziano applied for habeas corpus in the United States District Court for the Northern District of New York on the ground that his conviction violated his right to due process of law under the Fourteenth Amendment and the writ was dismissed. It was the appeal from the order dismissing the writ in *Graziano* that was argued before us on the same day Pugach's motion was argued. This Court has affirmed the order dismissing the writ in *Graziano* in an opinion filed herewith. This gives point to what may happen to Pugach if this motion is denied. In other words, once the federal law against wiretapping has been violated by state enforcement officers testifying at the trial to the contents of the wiretap, and a conviction has been obtained by use of such proof, the only remedy may well be a criminal prosecution against the enforcement officers who have violated the law or perhaps a civil suit by the convicted defendant for damages. That such remedies are hopelessly inadequate and that the convicted man will have suffered irreparable injury would seem to be self-evident. But here we can act in time to prevent the additional violation of Section 605 that will occur when the wiretap evidence is divulged and used at the trial.

[fol. 38]

In *United States* v. *Benanti*, 1957, 244 F. 2d 389, 391, we held:

> "Despite the warrant issued by the New York State court pursuant to New York law, we have no alternative other than to hold that by tapping the wires, intercepting the communication made by appellant and divulging at the trial what they had overheard, the New York police officers violated the federal statute. Nardone v. United States, 302 U. S. 379, 58 S. Ct. 275, 82 L. Ed. 314; Id., 308 U. S. 338, 60 S. Ct. 266, 84 L. Ed. 307; Weiss v. United States, 308 U. S. 321, 60 S. Ct. 269, 84 L. Ed. 298. Section 605 of 47 U. S. C. A. is too explicit to warrant any other inference, and the Weiss case made its terms applicable to intrastate communications. The section provides:
>
> > "'* * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person * * *.'"

We also held, following as we thought the earlier cases, especially *Wolf* v. *Colorado*, 1949, 338 U. S. 25, that the [fol. 39] fact that the federal officers had not participated in the wiretap and had no knowledge of it until the fact was brought out at the trial on cross-examination required us to affirm the conviction. In this we were mistaken, as the Supreme Court held the evidence was not admissible. *United States* v. *Benanti*, 1957, 355 U. S. 96. But our ruling[1] that the New York police officers had violated the federal law against divulging the contents of a wiretap, even though authorized by New York state law, was not disturbed. Instead, the Court held at pages 105-6:

> "In light of the above considerations, and keeping in mind this comprehensive scheme of interstate regulation and the public policy underlying Section 605 as part of that scheme, we find that Congress, setting out

[1] See also *United States* v. *Gris*, 2 Cir., 1957, 247 F. 2d 860, 863.

a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy.'"

Footnote 18 reads:

"In passing, it should be pointed out that several Attorneys General of the United States have urged Congress to grant exceptions to 605 to federal agents under limited circumstances. See, *e.g.*, Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on H. R. 762, 867, 4543, 4728, 5096, 84th Cong., 1st Sess. 28; Rogers, The Case for Wire Tapping, 63 Yale L. J. 792 (1954). But Congress has declined to do so. In view of this, it would seem unreasonable to believe that Congress is willing to allow this same sort of exception to state agents with no further legislation on its part."

[fol. 40] We find nothing to the contrary in *Schwartz* v. *Texas*, 1952, 344 U. S. 199, which merely construed Section 605 as precluding "the conclusion that Congress intended to thwart a state rule of evidence in the absence of a clear indication to that effect." See *Benanti*, 355 U. S. at page 101. In other words, the rule of evidence that permits proof illegally obtained to be received in evidence is a rule of state law and, in the absence of valid federal legislation to the contrary, the application of such a rule in and of itself does not constitute a violation of the constitutional requirement of due process.

In denying relief the District Judge relied upon *Stefanelli* v. *Minard*, 1951, 342 U. S. 117, where it was held that an injunction would not issue to prevent the New Jersey State Police from using in a state criminal prosecution the fruits of an unlawful search and seizure. But there the violation of the constitutional prohibition had already taken place. Under such circumstances it might well be thought that there was no more involved than a state rule to the effect that evidence illegally obtained was nonetheless admissible. Naturally there was a reluctance to interfere and disturb the delicate balance between federal

and state functions, especially in the administration of the criminal laws. Here the very act of the police officers in testifying and divulging the contents of the wiretap will constitute the commission of a separate federal crime *in futuro*.[2] We do not think we lack power to prevent this. Unless we act now it may well be too late. Surely the delicate balance between federal and state functions does not require the federal courts to sit idly by and countenance or acquiesce in persistent and repeated violations of federal law. Moreover, the fact that the wiretapping is [fol. 41] authorized pursuant to the Constitution and legislation of the State of New York, pursuant to which New York judges continue to order wiretapping and police officers do the wiretapping and divulge the contents of the wiretaps in their testimony, even after the Supreme Court has held these constitutional and legislative provisions to be an invasion of a field preempted by the Congress, makes the position of defendants even more untenable.

Accordingly, until the hearing and determination of the appeal from the order denying plaintiff's application for a temporary injunction and dismissing plaintiff's complaint, defendants and their agents and employees are hereby enjoined and restrained from using and disclosing wiretap evidence at the trial of Pugach in the County Court of Bronx County, New York, on the two indictments there pending against him.

WATERMAN, *Circuit Judge* (concurring):

I concur but solely on a very limited ground. If we deny the stay and the wiretap evidence is introduced at the trial next Monday, February 15, 1960, the important question presented by this application will not have been timely ruled upon, and, as appears in our opinion in *United States ex rel. Graziano* v. *McMann*, filed herewith, it is probable that nothing can be done thereafter to revive it. As soon as the wiretap evidence is offered and received at the trial and the contents of the wiretaps are thus di-

---

[2] See *Refoule* v. *Ellis*, D. C. N. D., Ga., 1947, 74 F. Supp. 336, cited in footnote in *Stefanelli* at p. 124.

vulged, the question now before us will have become moot. On the other hand, the granting of the stay will maintain the status quo pending appeal to our Court from the decision below. If we err in so doing, the stay will be promptly vacated by the United States Supreme Court, or [fol. 42] a Justice thereof, and defendants will then be free to tender the wiretaps in evidence at the trial in the County Court of Bronx County. Although it is intolerable that the federal courts should so presume to interfere with the orderly progress of the administration of justice in the State Courts by issuing stay orders, the present situation is intolerable, too. It goes against the grain to sit idly and await the violation of a federal statute one knows is to be violated, while also knowing that the only redress the United States may have after the violation is to proceed under §501 against a conscientious police officer who is only obeying orders.

Moreover, there is uncertainty among the State officers themselves. At least one of the Justices of the New York Supreme Court refuses to sign orders authorizing wiretaps on the ground that they are now clearly illegal under the ruling of the Supreme Court in *United States* v. *Benanti*, 355 U. S. 96 (1957). *Matter of Interception of Telephone Communications*, 9 Misc. 2d 121, 170 N. Y. S. 2d 84 (1958) (per Hofstadter, *J.*). But, as disclosed by the affidavits now before us, other Justices of the New York Supreme Court pursue a contrary course and numerous orders authorizing wiretaps are issued. This leaves in the middle conscientious New York State and municipal police officers who have tapped wires pursuant to court order. It could well be that some of them as the occasion presented itself, might be prosecuted for violating Section 605 when they divulge or publish what they have thus obtained. Such a divulgence would be in violation of the plain prohibition of the Section. Therefore, if at all possible to do so, it is in the public interest to have the present anomalous state of affairs clarified. For this reason, and this reason alone —and with many misgivings—I concur in the granting of the stay. I would point out that we are not enjoining [fol. 43] the prosecution itself, but only the introduction at the trial of wiretap evidence.

MADDEN, *Judge* (dissenting):

The petitioner-appellant's motion for stay of the criminal proceeding in the state court of New York assumes, correctly, that the New York Court will follow the New York rules of evidence, and will admit evidence obtained by tapping the petitioner's telephone.

The New York rule of evidence is,

> that the court, when engaged in trying a criminal case, will not take notice of the manner in which witnesses have possessed themselves of papers and other articles of personal property which are material and properly offered in evidence.

The foregoing quotation is from the opinion in *People* v. *Adams*, 176 N. Y. 351, 358, 68 N. E. 636, 638. It was quoted with approval in *People* v. *Richter's Jewelers*, 291 N. Y. 161, 51 N. E. 2d 690.

This rule of evidence is said by the petitioner to have been derived from the common law; to have been introduced into American jurisprudence toward the middle of the nineteenth century; and to have been adopted by a majority of American state jurisdictions.

The petitioner's estimate of the precedents is verified by *Wigmore on Evidence* (3rd Ed.), vol. 8, §§2183-2184b and *McCormick on Evidence*, §§137-142.

That the rule that wire-tap evidence is admissible is only a rule of evidence is confirmed by the highest authority, speaking in 1957, in *Benanti* v. *United States*, 355 U. S. 96, 101. There, Chief Justice Warren for a unan- [fol. 44] imous Court, distinguished *Schwartz* v. *Texas*, 344 U. S. 199, by saying:

> The rationale of that case is that despite the plain prohibition of Section 605 (the Federal Wiretapping Statute), due regard to federal-state relations precluded the conclusion that Congress intended to thwart a State rule of evidence in the absence of a clear intention to that effect.

What this Court is asked to do in the instant case is to hold that it is a violation of due process of law for a State

to apply a rule of evidence which is the rule in a majority of the States of the United States. Can it be that the essentials of "ordered liberty" of decent and rational process of law have been hidden from so many courts and judges and juristic authorities during so many years, and have now at last been revealed, and only to this Court?

The instant petition urges the Federal District Courts to go into the business of supervising the proceedings in State Courts in their day-to-day activities; to take a seat on the bench beside the State Court Judge and direct him how to rule on the admission of evidence offered at the trial. It would be hard to imagine a more intolerable practice, even if it were indulged in by judges of higher rank, but in the same judicial hierarchy. Here again we have recent admonition from the Supreme Court of the United States. In *Stefanelli* v. *Minard*, 342 U. S. 117, Mr. Justice Frankfurter wrote for the Court in a case practically on all fours with the instant one. There the petitioners sought, in a Federal Court, an injunction against the use, in a State criminal proceeding, of evidence obtained by State police by an illegal search. The Supreme Court said, at page 120,

> [fol. 45] Here the considerations governing that discretion [the discretion of a Court of Equity in determining whether to issue an injunction] touch perhaps the most sensitive source of friction between States and Nation, namely, the active intrusion of the federal courts in the administration of the criminal law for the prosecution of crimes solely within the power of the States.

At pages 123-124 the Supreme Court said:

> The consequences of exercising the equitable power here invoked are not the concern of a merely doctrinaire alertness to protect the proper sphere of the States in enforcing their criminal law. If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law —with its far-flung and undefined range—would invite a flanking movement against the system of State courts

by resort to the federal forum, with review if need be to this Court, to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution.

I would deny the requested stay.

[fol. 46]

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

BURTON N. PUGACH, Petitioner-Appellant,

v.

HON. ISIDORE DOLLINGER, District Attorney of Bronx County and
HON. STEPHEN P. KENNEDY, Police Commissioner of the City of New York, Respondent-Appellees.

ORDER STAYING STATE COURT CRIMINAL PROCEEDINGS
—February 11, 1960

A motion having been made herein by counsel for appellant Burton N. Pugach, to stay the trial of an action entitled People of the State of New York v. Burton N. Pugach, et al.,

Upon consideration thereof, it is

Ordered that until the hearing and determination of the appeal from the order denying plaintiff's application for a temporary injunction and dismissing plaintiff's complaint, the defendants and their agents and employees are hereby

enjoined and restrained from using and disclosing wire-tap evidence at the trial of Pugach in the County Court of Bronx County, New York, on the two indictments there pending against him in accordance with the opinion of this court.

A. Daniel Fusaro, Clerk.

[fol. 47]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 306-307—October Term, 1959

(Argued March 8, 1960)

Docket Nos. 26116-26147

BURTON N. PUGACH, Petitioner-Appellant,

—v.—

HONORABLE ISIDORE DOLLINGER, District Attorney of Bronx County, and HONORABLE STEPHEN P. KENNEDY, Police Commissioner of the City of New York, Respondent-Appellees.

JOHN O'ROURKE, JOSEPH DE GRANDIS, FRANK DE FORTE, ERNEST ZUNDEL, HERBERT JACOB, EUGENE JACOB, LAWRENCE GALLO, JOSEPH GALLO, NORMAN J. CLARK, JR., CHARLES DE FORTE, ANTHONY PAFUMI, also known as ANGELO PAFUMI, KENNETH CIAZZA, PASQUALE CATROPPA, PHILLIP LOSQUADRO and VINCENT LOSQUADRO, Plaintiffs-Appellants,

—v.—

MANFEL W. LEVINE, individually, and as District Attorney of Nassau County, State of New York, and JOHN M. BECKMANN, individually, and as Commissioner of Police of Nassau County, State of New York, Defendants-Appellees.

OPINION ON MERITS—April 14, 1960

[fol. 48] Before: Lumbard, Chief Judge, Clark, Waterman, Moore and Friendly, Circuit Judges.

Plaintiffs appeal from judgments rendered by the United States District Courts for the Southern and Eastern Districts of New York, Frederick vanPelt Bryan, *J.*, and Leo F. Rayfiel, *J.*, respectively, in two suits denying preliminary injunctions in actions seeking to prohibit state officers from divulging in state criminal trials evidence obtained by them through the tapping of plaintiffs' telephone wires on the ground that introduction of such evidence would constitute a violation of §605 of the Communications Act of 1934, 47 U. S. C. §605. Judgments affirmed.

Herbert S. Siegal, New York, N. Y. (Herbert Siegal and Louis Fusco, Jr., New York, N. Y.), for appellant Burton N. Pugach.

Emanuel Redfield, New York, N. Y., for the New York Civil Liberties Union, amicus curiae.

Irving Anolik, Assistant District Attorney, Bronx County (Isidore Dollinger, District Attorney and Walter E. Dillon, Assistant District Attorney, Bronx County, on the brief), for appellees Isidore Dollinger and Stephen P. Kennedy.

Louis J. Lefkowitz, Attorney General, State of New York, Samuel A. Hirshowitz, First Assistant Attorney General, George K. Bernstein, Assistant Attorney General and Vincent A. Marsicano, Assistant Attorney General, amicus curiae.

[fol. 49] Arthur Karger, New York, N. Y. (Zoloto & Karger, Jacques M. Schiffer, Price & Iovine and Leo Healy, on the brief), for appellants John O'Rourke, et al.

Henry P. DeVine, Assistant District Attorney, Nassau County (Manuel W. Levine, District Attorney, on the brief), for appellees Manuel W. Levine and John M. Beckmann.

LUMBARD, *Chief Judge*:

The question for decision is whether a federal court should enjoin state officers from divulging wiretap evidence in a state criminal trial, when introduction of this evidence will constitute the violation of a federal criminal statute. In the two cases before us Judges Bryan and Rayfiel both refused to grant injunctive relief, and we affirm their judgments.

In No. 306, *Pugach* v. *Dollinger*, appellant and several others were indicted in November 1959 by the State of New York for burglary in the second degree, maiming, assault in the second degree and conspiracy. Their case was set for trial on January 7, 1960. About two weeks before the trial was to begin appellant brought this suit in the Southern District of New York to enjoin the Bronx County District Attorney, the New York City Police Commissioner and their agents from making use at the state trial of evidence obtained by tapping appellant's telephone wires in June 1959 and of evidence obtained by the use of information overheard in the course of the tapping. The complaint alleged that, although the wiretap was obtained pursuant to state court authorization and in accordance with a state statute, its divulgence would constitute a violation of §605 of the Communications Act of 1934, 47 U. S. C. [fol. 50] §605. It further stated that wiretap evidence had been introduced before the grand jury in obtaining appellant's indictment and that the district attorney intended to make use of such evidence at trial. The district attorney has not denied that he expects to use wiretap evidence, nor does he contest appellant's allegations that appellant will be subject to irreparable injury if convicted by means of such evidence. Judge Bryan, relying primarily upon *Stefanelli* v. *Minard*, 342 U. S. 117 (1951), declined to grant a preliminary injunction and dismissed the complaint. *Pugach* v. *Sullivan*, 180 F. Supp. 66 (S. D. N. Y. 1960). Upon motion by appellant, this court stayed introduction of the wiretap evidence, pending determination of the appeal.[1]

[1] 2 Cir., Feb. 11, 1960, Slipsheet p. 731. There were three opinions. Judge Medina voted to grant the stay on grounds that would lead equally to the grant of an injunction. Judge Waterman con-

In No. 307, *O'Rourke* v. *Levine*, appellants are presently on trial in the Nassau County Court on an indictment charging them with conspiracy, extortion, attempted extortion and coercion. The selection of jurors began on February 1, 1960 and the taking of testimony started a week later. Suit in the Eastern District of New York to enjoin the introduction of wiretap evidence was commenced on February 16, 1960. The allegations of the appellants' bill are substantially the same as those in the *Pugach* case, though in *O'Rourke* the district attorney has stated on the record in the state court trial his intention to make use of wiretap evidence. Judge Rayfiel denied a preliminary injunction, distinguishing the grant of the stay pending appeal in Pugach on the ground that much greater disruption of the state court proceeding would result were the introduction of evidence in a trial already in progress enjoined. Both this court and subsequently Mr. Justice [fol. 51] Harlan of the Supreme Court declined to stay the introduction of the wiretap evidence pending appeal.

We convened an *en banc* session of the court to hear these appeals.

The jurisdiction of the district courts was properly founded upon §1337 of the Judicial Code, which states that "the district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce * * *." The Communications Act of 1934 is an "Act of Congress regulating commerce." See *Benanti* v. *United States*, 355 U. S. 96, 104-05 (1957); cf. *Mulford* v. *Smith*, 307 U. S. 38, 46 (1939). Since the asserted right to relief is based upon §605 of the Communications Act, a suit to protect the federal right against impairment by state officers is a suit "arising under" the federal statute. *A. F. of L.* v. *Watson*, 327 U. S. 582, 590-91 (1946).[2]

---

curred in the grant solely to preserve the status quo lest the case become moot before the appeal could be decided. Judge Madden of the Court of Claims, sitting with the Court by designation, dissented.

[2] Whether jurisdiction may also lie under 28 U. S. C. §1343(3) we do not decide.

Section 1343 provides in part:

Section 605 of the Communications Act states in pertinent part: " * * * no person not being authorized by the [fol. 52] sender shall intercept any communication and divulge the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person * * * " In *Nardone* v. *United States*, 302 U. S. 379 (1937) and 308 U. S. 338 (1939), the Supreme Court held that under 605 evidence obtained from wiretapping by federal officers was inadmissible in a federal court. In *Schwartz* v. *Texas*, 344 U. S. 199 (1952), upon direct review of a state criminal conviction it was held that the use of the same kind of evidence obtained by state officers was not prohibited by 605. The Court stated that it would not presume, in the absence of any clear manifestation of intent, that Congress intended to supersede a state rule of evidence permitting the introduction of evidence obtained by state officers and divulged in violation of a federal statute. Two years ago, in *Benanti* v. *United States*, *supra*, the Court held that wiretap evidence obtained by state officers was not admissible in a federal court, although the evidence was procured in accordance with a New York state statute authorizing

---

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States * * * "

In *McGuire* v. *Amrein*, 101 F. Supp. 414 (D. Md. 1951), the court held that it did not have jurisdiction of a suit identical in nature to that here under §1343(3), since §605 is not an "Act of Congress providing for equal rights of citizens" as that phrase is used in §1343(3). In *Stefanelli* v. *Minard*, 342 U. S. 117 (1951), the Supreme Court reserved the question whether jurisdiction lay under §1343(3) in a suit to enjoin the introduction of evidence in a state trial on the ground that the evidence was obtained by means of an unlawful search and seizure.

wiretapping pursuant to court order.[3] The Court reasoned that under §605 Congress intended to exclude from use in the federal courts evidence the divulgence of which would [fol. 53] be unlawful, regardless of its source. Though the Court made clear that tapping coupled with divulgence was a violation of §605, even when done pursuant to state law, it carefully distinguished the decision in *Schwartz* v. *Texas*, *supra*.[4]

---

[3] Section 813-a of the New York Code of Criminal Procedure, under which the wiretap orders were issued in *Benanti* and in the cases before us states in part:

> "An ex parte order for the interception, overhearing or recording of telegraphic or telephonic communications may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the County of New York upon oath or affirmation of a district attorney, or of the attorney-general or of any officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained and identifying the particular telephone number or telegraph line, and particularly describing the person or persons whose communications are to be intercepted, overheard or recorded and the purpose thereof. * * * Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. * * *"

Section 813-a was originally enacted in 1942 pursuant to Art. 1, §12, para. 2 of the New York Constitution, adopted in 1938, which states:

> "The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof."

[4] Whether both a tapping and a divulgence are necessary for a violation of §605 was specifically reserved by the Supreme Court in *Benanti*. See 355 U. S. at 100 n. 5. Since both elements are involved here, we need not consider whether tapping alone is lawful.

Appellants contend that we should enjoin the defendants from introducing wiretap evidence in the state court trials, since the divulgence of this evidence will violate §605. They contend that if we do not intervene, they will be subject to irreparable injury, because, if the evidence is introduced and they are found guilty their convictions will not be subject to reversal on appeal either under New York law, see *People* v. *Variano*, 5 N. Y. 2d 391, 185 N. Y. S. 2d 1 (1959), or federal law, *Schwartz* v. *Texas*, *supra*.

The exercise of the power of a federal court to grant equitable relief is a matter of discretion. In each case the court must balance the factors for and against the use of its power. See *Douglas* v. *City of Jeanette*, 319 U. S. 157 (1943). Here we think that the district courts properly concluded that the balance weighs against the exercise of the power to grant injunctive relief. We agree that in the [fol. 54] circumstances of these two cases a federal court should not intervene in criminal prosecution by a state for violation of its criminal laws. See *Voci* v. *Storb*, 235 F. 2d 48 (3 Cir. 1956).

Both Congress and the Supreme Court have often indicated their concern for the preservation of the balance between the states' administration of their laws and the use of federal equity power by restriction or withholding of the power of the federal courts. See, e.g., 28 U. S. C. §§1342, 2283; *Stefanelli* v. *Minard*, *supra*; *Watson* v. *Buck*, 313 U. S. 387 (1941); *Maryland* v. *Soper*, 270 U. S. 9, 270 U. S. 36, and 270 U. S. 44 (1926). Moreover, Congress, in §501 of the Communications Act, has provided that violation of §605 shall be a misdemeanor,[*] and we have held that §605 creates a civil action for damages in favor of one whose line is tapped. *Reitmeister* v. *Reitmeister*, 162 F. 2d 691 (2 Cir. 1947). Finally, we cannot overlook the long recognized principle of equity, based upon the policy of preserving the right to jury trial, that a court should not enjoin the commission of a crime. With these factors in mind, we do not think that a federal court should interfere with the prosecution of a state criminal proceeding in

[*] Convictions have been upheld under §501 for violation of §605. E.g., *United States* v. *Gris*, 247 F. 2d 860 (2 Cir. 1957).

order to provide an additional means of vindicating any private rights created by §605.

We are guided in our determination by the decision of the Supreme Court in *Stefanelli* v. *Minard, supra.* There the Court held that a federal court should refuse to intervene in a state criminal proceeding to enjoin the use of evidence claimed to have been secured by an unlawful search and seizure contrary to the Fourth Amendment. The plaintiff's claim in *Stefanelli* was closely analogous to that made here—that since under *Wolf* v. *Colorado*, 338 [fol. 55] U. S. 25 (1949), admission in a state court of evidence obtained by an unlawful search and seizure would not be ground for reversal of the conviction, a federal court should enjoin the introduction of such evidence. Mr. Justice Frankfurter's statement of the reasons for refusing injunctive relief in *Stefanelli* are equally applicable here:

> "The consequences of exercising the equitable power here invoked are not the concern of a merely doctrinaire alertness to protect the proper sphere of the States in enforcing their criminal law. If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution." (Footnotes omitted) 342 U. S. at 123-24.

It is urged that *Stefanelli* differs from the cases before us in that there the violation of federal law was the unlaw-

ful search itself, which had already taken place at the time of the suit for injunctive relief and which the federal court could therefore not prevent, while here the very act of divulging the evidence will constitute the commission of a federal crime. The distinction is not persuasive. The [fol. 56] decision in *Stefanelli* was placed on no such narrow ground, but was the expression of a general policy against "piecemeal" intervention by the federal courts in state proceedings for the purpose of litigating collateral issues. Moreover, the fact that the divulgence of the evidence sought to be enjoined will constitute the commission of a crime is not significant, since the plaintiffs must prevail, if at all, by vindication of their own rights under §605, not by collateral enforcement of the rights of the United States to prosecute under §501. As the Supreme Court said in *Schwartz* v. *Texas*, *supra*, at page 201, "the introduction of the intercepted communications would itself be a violation of the statute" is "simply an additional factor for the state to consider in formulating a rule of evidence for use in its own courts. Enforcement of the statutory prohibition in §605 can be achieved under the penal provision of §501."

Neither do we find it a persuasive ground of distinction that *Stefanelli* was an isolated case of federal law violation in New Jersey rather than what is called a consistent pattern in New York. Indeed, it could be argued that the constant conflicts that would be engendered between federal and state courts in an effort to deal with such a pattern would make this an *a fortiori* case for refusal to interfere. We have no reason to think that issuance of injunctions in these two cases would lead New York prosecutors to desist from this time forward from offering wiretap evidence in New York courts as permitted by the law of that state. On the contrary, the district courts would be flooded with suits for injunctions against the use of wiretap evidence and its alleged fruits in the state courts, with the consequent necessity of determining just what evidence was proposed to be introduced and whether the trial had reached such a stage that vindication of the federal right should be subordinated to practical considerations of state law enforcement; and all these determinations would be subject to appeal, with [fol. 57] the prosecution obstructed in the meanwhile. Our

respect for the supremacy clause is deep and abiding. But, as recognized in *Stefanelli v. Minard*, direct interference by federal courts in state criminal trials is quite a different matter from the analogies suggested by our brother Clark.

The stay granted by this court in *Pugach* v. *Dollinger* is vacated. The judgments are affirmed.

WATERMAN, *Circuit Judge*, concurring:

I concur in the result reached in both cases by the majority of the court; but I believe I should separately state certain individual views.

The injunction sought by petitioners in *O'Rourke et al.* v. *Levine* must be denied. A jury had been impaneled, trial had already begun, and some testimony had already been adduced, when the district court was importuned to affect future trial developments by an injunction order which, if granted, might limit the People's further proof. The disruptive complications that ensue when federal judicial power is exercised to interfere with a state court criminal trial after testimony has been received there clearly dictate that we affirm the action below. A proper respect for the relation of the United States to the States and the Courts of the States under these circumstances permits, in my belief, no other result. If at trial it appears that Section 605 of the Federal Communications Act is violated by an unauthorized divulgence by a witness under oath of an intercepted communication the United States can enforce that violation against the witness by prosecuting him under §501 of that Act. In fact, as I read the opinion of the Chief Justice speaking for a unanimous court in *Benanti* v. *United States*, 355 U. S. 96, at 103-106, even though the interception was authorized by a New York state wiretap order, the divulgence would be such a clear violation of the Federal [fol. 58] Communications Act that federal prosecuting officers would be expected to so prosecute.

Though I also concur in the result the majority reaches in *Pugach* v. *Dollinger and Kennedy*, the problems presented to us in that situation are much more difficult to resolve. There trial is not under way, and an injunction

issued by us in the exercise of our equity powers to preserve compliance with "the Supreme Law of the Land; * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding," will not disrupt a trial or create any confusion. Forbidding the introduction of wiretap testimony at a trial not yet begun would only serve to prevent counsel from introducing certain material; it would neither stay the criminal prosecution itself, nor embarrass the progress of a trial, nor require a mid-trial shift of strategy. And though New York, as well as the two other states in our Circuit, does not inquire how offered evidence was obtained, the quashing of wiretap evidence in advance of trial would not appear to be an unwarranted intrusion by us into State affairs inasmuch as the federal government has a very special interest in this field, an interest set forth by Congress in the Federal Communications Act with such thoroughness as to preempt the states from regulation save for certain stated exceptions not here applicable. *Benanti* v. *United States*, 355 U. S. 96, 103-106 (1957).

I receive the impression from reading the majority opinion that the majority, although having a deep and abiding respect for the supremacy clause, do not think that a federal court should ever interfere with the prosecution of a state criminal proceeding.

To such doctrine I cannot subscribe.

In order to preserve as best can be the pluralism of our form of government it is true that in the exercise of a proper judicial self-restraint we should ever hesitate to interfere with state criminal proceedings—even as here, [fol. 59] where it is claimed that unless we do interfere there will be open and overt violations of an Act of Congress.

But it is also true that though, as a general policy, we should refuse to act, there are "exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent * * * " Chief Justice Stone speaking for the Court in *Douglas* v. *City of Jeannette*, 319 U. S. 157 at 163.

Pugach v. *Dollinger* is an exceptional case, and it may well be that Judge Clark and Judge Medina are soundest in their approach to the problems it poses. I have hesitated

to agree with them only because I have faith that there is no clear irreparable injury to Pugach at this time. I assume, *arguendo*, that divulgence of information obtained by wiretap at his Bronx County trial will do Pugach irreparable injury; but I am not willing also to assume that a New York state trial judge will permit such evidence to be admitted over the objection of defense counsel. After all, New York state judges, as we, were bound when they took office, to support the Constitution of the United States: and they are fully cognizant of Article VI, Clause 2 thereof:

> "2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Schwartz v. *Texas*, 344 U. S. 199 (1952), and *Benanti* v. *United States*, *supra*, make clear, and all the opinions of the court in the present case recognize, that divulgence of the contents of a wiretap unless the divulgence is authorized by the sender will constitute a violation of Sections 605 and 501. It is therefore presumptuous to assume that any New [fol. 60] York State trial judge will acquiesce to the commission of a crime against the United States in his presence in his courtroom by a witness testifying under oath.

Though I hope I have made myself clear that I expect that no evidence of intercepted communications will be admitted at trial and that it is principally because of this belief that I concur in the result reached by the majority, nevertheless if I believed otherwise I might still refuse to issue an injunction under the doctrine of *Douglas* v. *City of Jeannette*, *supra*. If the offered evidence is admitted, despite *Benanti*, *supra*, and if Pugach is convicted and his conviction is affirmed by the New York Court of Appeals—see *People* v. *Dinan*, 6 N. Y. 2d 715, 185 N. Y. S. 2d 806 (1959), *cert. denied*, 361 U. S. 839; *People* v. *Variano*, 5 N. Y. 2d 391, 185 N. Y. S. 2d 1 (1959)—even then that conviction is subject to review by the Supreme Court. This possibility of a final federal review of a federal ques-

tion is perhaps enough so that under *Douglas* v. *City of Jeannette, supra*, Pugach may have an adequate remedy at law; and an injunction ought not to issue.

Where a state persistently sanctions violation of federal law, due process considerations may arise, see Judge Medina's concurring opinion in *United States ex rel. Graziano* v. *McMann*, 2 Cir. Feb. 11, 1960. As I indicated in my majority opinion in *Graziano*, I am unpersuaded for I believe *Schwartz* v. *Texas* to be controlling. But my opinion in that case is hardly the final one, and since Judge Medina's position is well-reasoned, it affords plaintiff something more than a faint prospect that his expected state conviction will be reviewable by the Supreme Court on certiorari. The precise question has never been decided, and in light of the dicta in *Salsburg* v. *Maryland*, 346 U. S. 545 (1954) and *Wolf* v. *Colorado*, 338 U. S. 25 (1948), the possibility of direct review is strong enough to justify my concurrence in the result reached by the majority. Nor should we over-[fol. 61] look the possibility that the Supreme Court might grant certiorari to reconsider *Schwartz* v. *Texas*.

Furthermore, I should point out that I not only differ from the majority wherein they apparently suggest that a federal court should never interfere with a state criminal prosecution, but I also differ from them wherein they rely for their result upon the doctrine expressed in *Stefanelli* v. *Minard*, 342 U. S. 117 (1951). Without in the least detracting from the force of that opinion it is my belief that that case and its doctrine are alike inapplicable here. In *Stefanelli* whatever federal crime was present had been fully committed before the federal court was importuned to interfere with the State Court proceedings. Here the threatened commission of federal crime is sought to be prevented by an application for relief to a federal court in advance of the occurrence. In the unlikely event a person were officially advised that his home was to be illegally searched by state officers on a particular date, I would suppose he could readily obtain injunctive relief from a federal court. It would be in this posture of affairs that the two situations would be similar.

One final point needs to be made. Normally it is not the province of a member of the federal judiciary to sug-

gest to a United States District Attorney how he should perform his duties.

I point out that in oral argument before this court sitting *in banc* counsel for the Pugach respondent-appellees did not deny that it was planned to offer wiretap evidence at that trial, and thereby did not deny to five federal judges in open court an intent to commit a federal crime. If such a crime is committed and remains unprosecuted after it has been stated by the U. S. Supreme Court in *Schwartz* v. *Texas*, *supra*, at page 201, and by us here that the interests of the United States may be adequately protected through enforcement of the penal provisions of Sec- [fol. 62] tion 501, there will have been a most extraordinary affront to this court. Accordingly I ask that the United States District Attorney for the Southern District of New York follow the proceedings in *People* v. *Pugach* with the closest attention. Similarly, I invite the attention of the United States District Attorney for the Eastern District of New York to the proceedings in *People* v. *O'Rourke, etc.*

CLARK, *Circuit Judge* (dissenting):

In its latest pronouncement upon the issue, the Supreme Court of the United States has refused to find exception for state officers from the sweeping federal ban on unauthorized interception and divulgence of "any communications," contained in §605 of the Federal Communications Act, 47 U. S. C. §605. Speaking through the Chief Justice of the United States, a unanimous Court finds "that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy." And it points out the failure of Congress to grant exceptions, though strongly importuned to do so. *Benanti* v. *United States*, 355 U. S. 96, 105, 106.

Notwithstanding its decisive character, there is nothing surprising in the Court's statement; indeed, it would have been surprising had the Court said less. For the absolute character of the prohibition has been steadily emphasized over the years and the attempt to make the statute say less than it does has been conspicuously unsuccessful. So we must accept the interpretation that wire tapping, whether

by state officers or by anyone else, is simply and shortly forbidden by federal law, subject to severe penalties of fine and imprisonment. 47 U. S. C. §501. Attack must therefore be limited to the need of new legislation because of its hampering effects on law enforcement if prosecuting officials cannot have the benefit of at least "controlled" wire tap- [fol. 63] ping. Involved are surely weighty arguments of public policy which the legislative body should weigh.[1] But these arguments have not as yet prevailed with the only governmental agency having authority to act to modify the existing law, and I do not see how they can affect the responsibility of United States judges to enforce that law. Hence for us I see no escape but to start with the premise that we are faced with repeated open and acknowledged violations of federal law which we are assured will be continued until and unless federal authorities intervene.

Thus we have an absolute impasse going so far as to be almost ludicrous if the issue were not so fundamentally serious. It seems generally conceded that wire tapping is an evil thing, particularly when employed by criminal or underworld characters and their associates. Yet it has not been possible to enforce the law against such persons when at the same time it is not enforced against even more open violators, albeit with loftier motives.[2] Thus one restrained comment puts it mildly: "Weighing the individual's right to privacy against the need for effective detection of criminals, we are met with the kind of conflict of values which characterizes many areas of our law and our social organization. In the case of wire tapping, however, this competi-

[1] That the legislative is the correct and indeed the only approach to a solution is the tenor of a discriminating article by the Chairman of the New York Joint Legislative Committee to Study Illegal Interception of Communications. Savarese, *Eavesdropping and the Law*, 46 A. B. A. J. 263 (1960). See also Gerhart, *Let's Take the Hypocrisy Out of Wiretapping*, 30 N. Y. St. B. Bull. 268 (1958); Williams, *Wiretapping Should Be Liberalized*, 30 N. Y. St. B. Bull. 261 (1958).

[2] There appears to have been only one successful prosecution under the statute, *United States* v. *Gris*, 2 Cir., 247 F. 2d 860. James R. Hoffa was prosecuted and acquitted. See Savarese, *supra* note 1, at 266.

tion of social interests has resulted in a dangerous stalemate—a failure to find a workable adjustment—which leaves Mr. Smith, the average citizen, at the mercy of the more ruthless in our population. For, despite the statutes [fol. 64] and judicial decisions which purport to regulate wire tapping, today this practice flourishes as a wide-open operation at the federal, state, municipal, and private levels." Westin, *The Wire-Tapping Problem: An Analysis and a Legislative Proposal*, 52 Col. L. Rev. 165, 167 (1952).

Professor Westin goes on to point out (from a careful analysis of congressional hearings and other cited material) how this "stalemate" affects the lives and fortunes of ordinary citizens, as well as others, and how the criticized practice taps the conversation of public officials in every sort of government agency, of business men in business organizations, of private persons for purposes as diverse as labor espionage or securing evidence of a wife's infidelity, and with schools or training centers for instructing telephone tappers.[3] More recently a detailed study sponsored by the Pennsylvania Bar Association Endowment shows much of wire tapping in action, with a description of "The Tools" and with detailed investigation particularly of police activities in several important metropolitan areas, including New York. See Dash, Schwartz and Knowlton, The Eavesdroppers 35 *et seq.* (1959). This suggests a much more prevalent practice than many officials have been willing to admit, although even the conceded number of ex parte court orders issued under the New York statutes appears quite adequate to show the pattern.[4] And other material of like effect is extensively available.[5]

---

[3] 52 Col. L. Rev. 165, 167, 168 (1952), quoted by Professor Donnelly of Yale in his careful article, *Comments and Caveats on the Wire Tapping Controversy*, 63 Yale L. J. 799 (1954).

[4] In *Wiretapping in New York*, 31 N. Y. U. L. Rev. 197 (1956), the figures for the orders received by the telephone company in New York City are given, viz., 1135 orders (good for 90 days) affecting 1954 wires for the year 1954 and 1013 orders affecting 1662 wires for the year 1953. The defendants take exception to the figures given by Mr. Justice Douglas, An Almanac of Liberty 355 (1954), but quote approvingly those given by Brown and Peer, *The Wiretapping Entanglement: How to Strengthen Law Enforcement and Preserve Privacy*, 44 Cornell L. Q. 175, 183 (1959),

[fol. 65] In sum it is beyond dispute that there is a general, indeed universal, custom of federal law violation. Now this is a distressing situation, made not less so that in the eyes of many worthy citizens it is required by the asserted exigencies of successful law administration. But it is not an unusual situation. For actually it is a clash between federal and state governmental policies. As such it is a recurring struggle in our history and quite possibly a necessary one to a federal form of government.[5] In the past we have found ways of meeting and solving the prob-[fol. 66] lem. Of course there are several forms of remedy;

---

as being a total of 480 orders in New York City in 1952. In Dash, Schwartz and Knowlton, The Eavesdroppers 39 *et seq.*, 68, 69 (1959), the authors suggest that Mr. Justice Douglas' estimate properly refers to wire taps, not orders, and then, making their own estimate of from 16,000 to 29,000 wire taps a year, also suggest that the Justice's estimate is thus "closer to the truth than the figures submitted by the police to the Kings County prosecutor." More lately Mr. Dash has given an estimate of from 13,000 to 20,000 wire taps per year. Hearing before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, U. S. Senate, 86th Cong., 1st Sess., pursuant to S. Res. 62, Pt. 3, Wiretapping, Eavesdropping, and the Bill of Rights, 520-521 (1960).

[5] Earlier citations are given by Professor Donnelly, in the article cited in note 3 *supra*. Later references appear in 57 Col. L. Rev. 1159 (1957); 26 Ford. L. Rev. 540 (1957); 31 N. Y. U. L. Rev. 197 (1956); 67 Yale L. J. 932 (1958); and Dash, Schwartz and Knowlton, The Eavesdroppers 443, 458 *et seq.* (1959), including also references to Congressional and New York state legislative hearings. See also the statements and articles by law professors and others in the Hearing cited *supra* note 4, at 566-714.

[6] See Demet, *A Trilogy of Massive Resistance*, 46 A. B. A. J. 294, 296 (1960):

> "As demonstrated, disobedience, disrespect and massive resistance to the mandates of the United States Supreme Court are relatively old historical concepts practiced by various of the Sovereign States of the Union when it was felt the Court trespassed into spheres in which the various states had ideological and sociological views contrary to the edicts and mandates of the Court.
>
> "It is interesting to speculate what the state courts would have done if the segregation cases had reached the Supreme Court by way of state courts and not the federal courts."

but the one to which there seems continual return when other remedies fail is the resort to the equity powers of the federal courts to enjoin repeated violations of the criminal law. This is an old and well established ground of equity jurisdiction, naturally to be resorted to only reluctantly as against state officials, but nevertheless thoroughly recognized. Thus the authority of United States courts to enjoin state officials, including prosecutors and others, from repeated violations of overriding federal law has long been upheld in a variety of circumstances such as alien land ownership, rate regulation, closed shop and railroad tariff laws, and the like. Thus, for example, see *American Federation of Labor* v. *Watson*, 327 U. S. 582; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 147 A. L. R. 674; *Watson* v. *Buck*, 313 U. S. 387; *Hague* v. *C. I. O.*, 307 U. S. 496; *Sterling* v. *Constantin*, 287 U. S. 378; *Terrace* v. *Thompson*, 263 U. S. 197; *Ex parte Young*, 209 U. S. 123; *Smyth* v. *Ames*, 169 U. S. 466, modified 171 U. S. 361. And see also *Rea* v. *United States*, 350 U. S. 214, upholding an injunction preventing a federal agent from transferring federally suppressed evidence to a state court or there testifying.

Directly in point also and perhaps most persuasive of all in view of the close analogy are the modern segregation cases. Thus see *Brown* v. *Board of Education of Topeka*, 347 U. S. 483, 38 A. L. R. 2d 1180, 349 U. S. 294; *Cooper* v. *Aaron*, 358 U. S. 1; *Harrison* v. *National Ass'n for the Advancement of Colored People*, 360 U. S. 167, 179; *Faubus* v. *United States*, 8 Cir., 254 F. 2d 797, certiorari denied 358 U. S. 829; *Clemons* v. *Board of Ed. of Hillsboro, Ohio*, 6 Cir., 228 F. 2d 853, certiorari denied *Board of Ed. of Hillsboro, Ohio* v. *Clemons*, 350 U. S. 1006. As these cases all demonstrate, a suit against a state officer violating federal law is not within the prohibition of actions against a state. [fol. 67] See also Judge Parker's complete statement in *School Bd. of City of Charlottesville, Va.* v. *Allen*, 4 Cir., 240 F. 2d 59, certiorari denied 353 U. S. 910.

All these questions of jurisdiction the majority opinion herewith concedes, including the irreparable injury sustained. I agree thoroughly with the principles here stated; but that leaves only *Stefanelli* v. *Minard*, 342 U. S. 117, and

the question of the niceties of the exercise of federal equity jurisdiction left to give us pause. For *Stefanelli* recognizes the jurisdiction of equity and emphasizes only the restraint which the federal court should show against interfering with state criminal processes. I agree wholeheartedly, but ask (as was asked with respect to Little Rock schools, martial law in the Texas oil fields, and other historic federal-state clashes), When does enough of federal law violation become too much? The facts rehearsed above demonstrate in my opinion that only by the course of federal injunction will the present impasse be resolved. *Schwartz* v. *Texas*, 344 U. S. 199, shows that the way is not by appeal from a conviction already had; indeed it confirms the view that this is the one healthy and direct and complete solution. A clean excision is better than continuous mangling. Involved in *Stefanelli* was an isolated case of federal law violation, not a consistent pattern as here. Also to be noted is the less direct compulsion of the federal law there, since the Fourth Amendment does not touch the problem of communication and evidence directly; no federal crime was there involved; and the damage had already been done.[1] Carefully considered I regard *Stefanelli* as authority showing the need and the utility of the action I urge, rather than to the contrary.

[fol. 68]

Consequently I am persuaded by and would follow the good opinion of Judge Medina upon the grant of a stay in this case. *Pugach* v. *Dollinger*, 2 Cir., Feb. 11, 1960. I also note that two state justices have reached a like conclusion and decline to proceed further in wire tapping. *Matter of Interception of Telephone Communications*, 9 Misc. 2d 121, 170 N. Y. S. 2d 84, Hofstadter, *J.*; *Application for an Order Permitting the Interception of Telephone Communi-*

[1] Hence for the exercise of a court's discretion there is a real difference between a completed case and one which is still pending, as we have held in *U. S. ex rel. Graziano* v. *McMann*, 2 Cir., Feb. 11, 1960. This difference might serve to distinguish the *O'Rourke* case here from that of *Pugach*. Thus, there is much more reason to refuse an injunction in *O'Rourke*. On the whole, however—except and unless the trial has proceeded further than was evident at our hearing—I do not believe the *O'Rourke* case has gone so far but that justice will be better served by the issuance of an injunction there also.

cations of Anonymous, 207 Misc. 69, 136 N. Y. S. 2d 612, Hofstadter, *J.*: *Application for Order Permitting Interception of Telephone Communications*, 28 U. S. L. Week 2446 (N. Y. Ct. Gen. Sess., N. Y. C., March 7, 1960), Davidson, *J.* These cases not only illustrate the uncertain and anomalous position into which state judges are now thrust, but also are good examples to United States judges. In the first case cited here, Mr. Justice Hofstadter makes a very pointed allusion to the mandate of the United States Constitution that laws made pursuant to it are "the Supreme Law of the Land," binding upon us all, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U. S. Const. Art. VI, cl. 2. This reminder from a distinguished state brother of the necessity for obedience to the "Supreme Law" ought to go far to allay the fear expressed that the state officials will defy this law, even after it has been authoritatively defined in the course of this litigation, and that the federal courts will be flooded with actions to curb this defiance. For my part I entertain no such fear of either the defiance or the flood of cases; and hence I forego comment on the implication that mere number of applications may bar the right to equity relief. On the contrary I [fol. 69] venture to believe that our state brothers and colleagues in law enforcement, both on the bench and in the prosecuting offices, will welcome definitive resolution of the present hopeless stalemate and will hasten to comply with the requirements of law as soon as they are made clear.

I would reverse the judgments below for the issuance of the injunctions sought.

So held also by Judge Rayfiel in *Barack* v. *State Liquor Authority of State of N. Y.*, D. C. E. D. N. Y., 160 F. Supp. 161.

[fol. 70]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BURTON N. PUGACH, Plaintiff-Appellant,

v.

HON. ISIDORE DOLLINGER, District Attorney of Bronx County and HON. STEPHEN P. KENNEDY, Police Commissioner of the City of New York, Defendants-Appellees.

JUDGMENT—April 14, 1960

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the appellees.

Further ordered that the stay heretofore granted by this Court on February 11, 1960 be and it hereby is vacated.

A. Daniel Fusaro, Clerk.

[fol. 71] [File endorsement omitted]

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING AND GRANTING STAY—April 26, 1960

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

Further ordered that the defendants-appellees are enjoined from using and disclosing wiretap evidence until May 16, 1960.

Further ordered that said stay shall continue until the final disposition of the action by the Supreme Court of the United States if on or before May 16, 1960 there is filed here a certificate of the Clerk of the Supreme Court that a certiorari petition, record and briefs have been filed.

A. Daniel Fusaro, Clerk.

[fol. 72] Clerk's Certificate (omitted in printing).

— —

[fol. 73]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed June 27, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office-Supreme Court, U.S.
FILED
MAY
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960

No. 111

BURTON N. PUGACH,

Petitioner,

—against—

HONORABLE ISIDORE DOLLINGER, District Attorney of Bronx County, and HONORABLE STEPHEN P. KENNEDY, Police Commissioner of the City of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GEORGE J. TODARO
Counsel for Petitioner
Office & P. O. Address
135 Broadway
New York 6, N. Y.

CASE PRESS INC., 82 Beekman St., N. Y.—BEekman 3-2015

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement	4
Reasons for Granting Writ	6
Conclusion	14
Appendix A	15
Appendix B	40
Appendix C	53
Appendix D	55

Authorities Cited

Cases

Application for Order Permitting Interception of Telephone Communications, 28 U. S. L. Week 2446	12
Benanti v. U. S., 355 U. S. 96	6, 8
Nardone v. U. S., 302 U. S. 379	13
Nardone v. U. S., 308 U. S. 338	13
People v. Broady, 1959, 5 N. Y. 2d 500	12
People v. Variano, 1959, 5 N. Y. 2d 391	12
Pugach v. Sullivan, 180 F. Supp. 66 (S.D.N.Y. 1960)	2

Statutes

28 U.S.C. Secs. 1337, 1343	2
47 U.S.C. Sec. 605	2, 6, 13, 14

IN THE

Supreme Court of the United States

October Term, 1960

No.

BURTON N. PUGACH,

Petitioner,

—against—

HONORABLE ISIDORE DOLLINGER, District Attorney of Bronx County, and HONORABLE STEPHEN P. KENNEDY, Police Commissioner of the City of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming a judgment dismissing the complaint and vacating a stay in an action brought in the United States District Court for the Southern District of New York against the District Attorney of Bronx County and the Police Commissioner of New York City for a permanent injunction restraining the use by them, and their agents and employees, on the forthcoming trial on two indictments against the petitioner from the use of certain wiretap evidence.

Opinions Below

The majority opinion of the Court of Appeals and dissenting opinion (App. A) has not yet been reported. The majority opinion of the Court of Appeals (App. B) and dissenting opinion on the temporary order staying respondent from use at the trial of the wiretap evidence has not yet been reported. The District Court's opinion in denying petitioner's motion for a preliminary injunction and granting the respondent's motion to dismiss the complaint has been reported. *Pugach* v. *Sullivan*, 180 F. Supp. 66 (S. D. N. Y. 1960).

Jurisdiction

The judgment of the Court of Appeals was entered on April 14, 1960 (App. C). A petition for rehearing was denied on April 26, 1960 (App. D). The jurisdiction of this Court is invoked under 28 U. S. C. 1337, 1343.

Question Presented

Whether in a state criminal prosecution the Federal Court can enjoin state officials from using, at a trial, evidence obtained by state police in violation of Sec. 605 of the Federal Communications Act.

Statute Involved

Act of June 19, 1934, c. 652, §605, 48 Stat. 1103, 47 U. S. C. §605:

> "No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any inter-

state or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

Statement

An indictment was returned against the petitioner, Burton N. Pugach, an attorney admitted to practice in the State of New York, and others, by the Grand Jury of Bronx County, New York, which indictment charged the petitioner with the crimes of burglary in the second degree, maiming, assault in the second degree and conspiracy. Another indictment charges petitioner with felonious possession of firearms.

The present action was brought in the United States District Court for the Southern District of New York against the District Attorney of Bronx County and the Police Commissioner of New York City for a permanent injunction restraining the use by them and their agents and employees on the forthcoming trial of certain wiretap evidence. A motion for a preliminary injunction was denied and the complaint was dismissed by the District Court.

Petitioner appealed to the Circuit Court of Appeals from the order denying a preliminary injunction and dismissing his complaint. Petitioner moved the Court of Appeals for a stay pending appeal. The motion was granted by order dated February 11, 1960. For the opinion of the Court of Appeals in granting stay pending appeal see App. B.

It is not disputed that the respondents, or their agents, on June 15, 1959, procured an order of the Supreme Court of the State of New York permitting Pugach's office telephone wires to be tapped; that they were tapped; and the contents of the wiretaps were divulged to the Grand Jury, and that the District Attorney intended to make use

of such evidence at the trial. The District Attorney has not denied that he expects to use the wiretap evidence, nor does he contest petitioner's allegation that the appellant will be subject to irreparable injury if convicted by means of such evidence (See Statement of Facts in the opinion of Judge Medina App. B and Judge Lumbard App. A).

Petitioner's contention is succinctly and clearly stated by Judge Medina (App. B) wherein he states, as follows:

> "Pugach's argument is: that Section 605 of the Federal Communications Act makes it a federal crime to tap a telephone and 'divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication'; that defendants or their agents are about to commit this federal crime by further divulging and offering the wiretaps in evidence at the trial; that the Supreme Court has in effect held in *United States* vs. *Benanti*, 1957, 355 U. S. 96, that the constitutional and legislative authorization of wiretaps by the State of New York is illegal and void; that if the evidence is received at the trial and Pugach is convicted he will be wholly without remedy, since under *Schwartz* v. *Texas*, 1952, 344 U. S. 199, which is still in effect, the evidence will be admissible under the New York rules of evidence, even though illegally obtained, and his conviction will not be reversed. He also claims that the result of such violations of federal law will deprive him of his liquor license and his license to practice law. Pugach argues that, unless we gant the injunctive relief he prays, defendants and their agents will go ahead and violate the federal statute with impunity, shielding themselves behind a constitutional and legislative scheme of the State of New York that has been held by the Supreme Court to be invalid. *This is a powerful argument and we have been unable to find any satisfactory answer to it*" (Italics ours).

Reasons for Granting Writ

The problem before this Court is an old and venerable one. The conflict between State and Federal powers. *Benanti* v. *U. S.*, 355 U. S. 96, seemingly resolved this problem with respect to Sec. 605 of the Communications Act when it stated at pages 105-106, as follows:

> "In light of the above considerations, and keeping in mind this comprehensive scheme of interstate regulation and the public policy underlying Section 605 as part of that scheme, we find, that Congress, setting out a prohibition in plain terms, did *not mean to allow state legislation which would contradict that section and that policy.*" (Italics ours)

Footnote 18 reads:

> "In passing, it should be pointed out that several Attorneys General of the United States have urged Congress to grant exceptions to Sec. 605 to federal agents under limited circumstances. See, e.g., Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on H. R. 762, 867, 4512, 4728, 5096, 84th Cong., 1st Sess. 28; Rogers, The Case for Wire Tapping, 63, Yale L. J. 792 (1954). But Congress has declined to do so. In view of this, it would seem unreasonable to believe that Congress is willing to allow this same sort of exception to state agents with no further legislation on its part."

Further, Judge Medina, in his opinion (App. B), stated as follows:

> "Moreover, the fact that the wiretapping is authorized pursuant to the Constitution and legislation of the State of New York, pursuant to which New York judges continue to order wiretapping and police

officers do the wiretapping and divulge the contents of the wiretaps in their testimony, even after the Supreme Court has held these constitutional and legislative provisions to be an invasion of a field *pre-empted by the Congress, makes the position of defendants even more untenable.*" (Italics ours)

Judge Waterman's opinion is also of interest when he states as follows (App. B) at page 738:

"Moreover, there is uncertainty among the State officers themselves. At least one of the Justices of the New York Supreme Court refuses to sign orders authorizing wiretaps on the ground that they are now clearly illegal under the ruling of the Supreme Court in *United States* v. *Benanti*, 355 U. S. 96 (1957). *Matter of Interception of Telephone Communications*, 9 Misc. 2d 121, 170 N. Y. S. 2d 84 (1958) (per Hofstadter, J.). But, as disclosed by the affidavits now before us, other Justices of the New York Supreme Court pursue a contrary course and numerous orders authorizing wiretaps are issued. This leaves in the middle conscientious New York State and municipal police officers who have tapped wires pursuant to court order. It could well be that some of them, as the occasion presented itself, might be prosecuted for violating Section 605 when they divulge or publish what they have thus obtained. Such a divulgence would be in violation of the plain prohibition of the Section. Therefore, if at all possible to do so, it is in the *public interest to have the present anomalous state of affairs clarified.*" (Italics ours)

Judge Clark, in his dissenting opinion, stated as follows, (App. A) at page 1414:

"In its latest pronouncement upon the issue, the Supreme Court of the United States has refused to

find exception for state officers from the sweeping federal ban on unauthorized interception and divulgence of 'any communications,' contained in Sec. 605 of the Federal Communications Act, 47 U. S. C. Sec. 605. Speaking through the Chief Justice of the United States, a unanimous Court finds 'that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy.' And it points out the failure of Congress to grant exceptions, though strongly importuned to do so. *Benanti* v. *United States*, 355 U. S. 96, 105, 106.

Notwithstanding its decisive character, there is nothing surprising in the Court's statement; indeed, it would have been surprising had the Court said less. For the absolute character of the prohibition has been steadily emphasized over the years and the attempt to make the statute say less than it does has been conspicuously unsuccessful. So we must accept the interpretation that wire tapping, whether by state officers or by anyone else, is simply and shortly forbidden by federal law, subject to severe penalties of fine and imprisonment. 47 U. S. C. Sec. 501. Attack must therefore be limited to the need of new legislation because of its hampering effects on law enforcement of prosecuting officials cannot have the benefit of at least 'controlled' wire tapping. Involved are surely weighty arguments of public policy which the legislative body should weigh. But these arguments have not as yet prevailed with the only governmental agency having authority to act to modify the existing law, and I do not see how they can affect the responsibility of United States judges to enforce that law. *Hence for us I see no escape but to start with the premise that we are faced with repeated open and acknowledged violations of federal law*

which we are assured will be continued until and unless federal authorities intervene.

Thus we have an absolute impasse going so far as to be almost ludicrous if the issue were not so fundamentally serious." (Italics ours)

Further, Judge Clark, stated, at page 1417, as follows:

"In sum it is beyond dispute that there is a general, indeed universal, custom of federal law violation. Now this is a distressing situation, made not less so that in the eyes of many worthy citizens it is required by the asserted exigencies of successful law administration. But it is not an unusual situation. For actually it is a clash between federal and state governmental policies. As such it is a recurring struggle in our history and quite possibly a necessary one to a federal form of government. In the past we have found ways of meeting and solving the problem. Of course there are several forms of remedy; but the one to which there seems continual return when other remedies fail is the resort to the equity powers of the federal courts to enjoin repeated violations of the criminal law. This is an old and well established ground of equity jurisdiction, naturally to be resorted to only reluctantly as against state officials, but nevertheless thoroughly recognized. Thus the authority of United States courts to enjoin state officials, including prosecutor and others, from repeated violations of overriding federal laws has long been upheld in a variety of circumstances such as alien land ownership, rate regulation, closed shop and railroad tariff laws, and the like. Thus, for example, see *American Federation of Labor* v. *Watson*, 327 U. S. 582; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 147 A. L. R. 674; *Watson* v. *Buck*, 313

U. S. 387; *Hague* v. *C. I. O.*, 307 U. S. 496; *Sterling* v. *Constantin*, 287 U. S. 378; *Terrace* v. *Thompson*, 263 U. S. 197; *Ex parte Young*, 209 U. S. 123; *Smyth* v. *Ames*, 169 U. S. 466, modified 171 U. S. 361. And see also *Rea* v. *United States*, 350 U. S. 214, upholding an injunction preventing a federal agent from transferring federally suppressed evidence to a state court or there testifying.

Directly in point also and perhaps most persuasive of all in view of the close analogy are the modern segregation cases. Thus see *Brown* v. *Board of Education of Topeka*, 347 U. S. 483, 38 A. L. R. 2d 1180, 349 U. S. 294; *Cooper* v. *Aaron*, 358 U. S. 1; *Harrison* v. *National Ass'n for the Advancement of Colored People*, 360 U. S. 167, 179; *Faubus* v. *United States*, 8 Cir., 254 F. 2d 797, certiorari denied, 358 U. S. 829; *Clemons* v. *Board of Ed. of Hillsboro, Ohio*, 6 Cir., 228 F. 2d 853, certiorari denied *Board of Ed. of Hillsboro, Ohio* v. *Clemons*, 350 U. S. 1006. As these cases all demonstrate, a suit against a state officer violating federal law is not within the prohibition of actions against a state. See also Judge Parker's complete statement in *School Bd. of City of Charlottesville, Va.* v. *Allen*, 4 Cir., 240 F. 2d 59, certiorari denied 353 U. S. 910.

All these questions of jurisdiction the majority herewith concedes, including the irreparable injury sustained. I agree thoroughly with the principles here stated; but that leaves only *Stefanelli* v. *Minard*, 342 U. S. 117, and the question of the niceties of the exercise of federal equity jurisdiction left to give us pause. For *Stefanelli* recognizes the jurisdiction of equity and emphasizes only the restraint which the federal court should show against interfering with state criminal processes. I agree wholeheartedly, but ask (as was asked with respect to

Little Rock schools, martial law in the Texas oil fields, and other historic federal-state clashes). When does enough of federal law violation become too much? The facts rehearsed above demonstrate in my opinion that only by the course of federal injunction will the present impasse be resolved. *Schwartz* v. *Texas*, 344 U. S. 199, shows that the way is not by appeal from a conviction already had; indeed it confirms the view that this is the one healthy and direct and complete solution. A clean excision is better than continuous mangling. Involved in *Stefanelli* was an *isolated* case of federal law violation, not a consistent pattern as here. Also to be noted is the less direct compulsion of the federal law there, since the Fourth Amendment does not touch the problem of communication and evidence directly; no federal crime was there involved; and the damage had already been done. Carefully considered I regard *Stefanelli* as authority showing the need and the utility of the action I urge, rather than to the contrary.

Consequently I am persuaded by and would follow the good opinion of Judge Medina upon the grant of a stay in this case. *Pugach* v. *Dollinger*, 2 Cir., Feb. 11, 1960. I also note that two state justices have reached a like conclusion and decline to proceed further in wire tapping. *Matter of Interception of Telephone Communications*, 9 Misc. 2d 121, 170 N. Y. S. 2d 84, Hofstadter, J.; *Application for an Order Permitting the Interception of Telephone Communications of Anonymous*, 207 Misc. 69, 136 N. Y. S. 2d 612, Hofstadter, J.; *Application for Order Permitting Interception of Telephone Communications*, 28 U. S. L. Week 2446 (N. Y. Ct. Gen Sess., N. Y. C., March 7, 1960), Davidson, J. These cases not only illustrate the uncertain and anomalous position into which state judges are now thrust, but

> also are good examples to United States judges. In the first case cited here, Mr. Justice Hofstadter makes a very pointed allusion to the mandate of the United States Constitution that laws made pursuant to it are 'the Supreme Law of the Land,' binding upon us all, 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'' U. S. Const. Art. VI, cl 2. This reminder from a distinguished state brother of the necessity for obedience to the 'Supreme Law' ought to go far to allay the fear expressed that the state officials will defy this law, even after it has been authoritatively defined in the course of this litigation, and that the federal courts will be flooded with actions to curb this defiance. For my part I entertain no such fear of either the defiance or the flood of cases; and hence I forego comment on the implication that mere number of applications may bar the right to equity relief. On the contrary I venture to believe that our state brothers and colleagues in law enforcement, both on the bench and in the prosecuting offices, will welcome definitive resolution of the present hopeless stalemate and will hasten to comply with the requirements of law as soon as they are made clear.''

The uncertainty and confusion that exists in the New York State Judiciary on this question, is manifested when an eminent Jurist of the Court of General Sessions, New York County, Davidson, *J.*, despite the ruling of the New York Court of Appeals, in the case of *People* v. *Variano*, 1959, 5 N. Y. 2d 391, and *People* v. *Broady*, 1959, 5 N. Y. 2d 500, on March 7th, 1960, refused to sign an order to permit a wiretap, in the matter of the "*Application for Order Permitting Interception of Telephone Communications*," 28 U. S. L. Week 2446.

Judge Davidson, in his opinion, stated:

> "Lawlessness by the police and the district attorney, who are sworn to uphold and enforce the law will not aid in the enforcement of the criminal law, nor will it heighten the respect of our citizens for our law."

In *Nardone* v. *U. S.*, 302, U. S. 379, at page 383, the Court stated as follows:

> "The answer to the question is one of *policy*. Congress may have though it less important that some offenders should go unwhipped of justice than that the officers should resort to methods *inconsistent with ethical standards and destructive of personal liberty.*" (Italics ours)

From the above it is apparent that Congress set forth *ethical standards* for the *whole* people of the United States, including the people of the State of New York. There are no exceptions.

In the second *Nardone* case, *Nardone* v. *U. S.*, 308, U. S. 338, at page 341, the Supreme Court stated as follows:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that merely the evidence shall not be used before the Court, but that it shall *not be used at all.* (Italics ours)
>
> A decent respect for the policy of Congress must save us from imputing to it a *self defeating, if not disingenuous purpose.*" (Italics ours)

This language cannot be misinterpreted. Congress in passing Sec. 605 of the Federal Communications Act did not intend to pass a law that was *self defeating.* To permit the

State of New York, or any other state, under the guise of evidentiary rules to violate this law with impunity would amount to nullification or destruction of the "ethical standards" established by Congress, as representatives of our Federal Government and all of its people.

The issue presented by this case is thus one of first impression and great importance. Concededly the use of wiretapping by state law enforcement officers is widespread. There is no way to determine the extent to which federal officers are making use of state wiretaps, but there is every reason to believe that such use is also widespread.

It is thus apparent that the issue here presents an important and far reaching question in the field of federal and state powers. The conflict must be resolved lest an Act of Congress, such as Sec. 605 of the Federal Communications Act, be nullified and invalidated by the non-enforcement by the executive branch of the Federal Government, and the continuous and willful violation by the states.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

GEORGE J. TODARO
Counsel for Petitioner
Office & P. O. Address
135 Broadway
New York 6, N. Y.

May, 1960

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 306-307—October Term, 1959.

(Argued March 8, 1960 Decided April 14, 1960.)

Docket Nos. 26116-26147

BURTON N. PUGACH,

Petitioner-Appellant,

—v.—

HONORABLE ISIDORE DOLLINGER, District Attorney of Bronx County, and HONORABLE STEPHEN P. KENNEDY, Police Commissioner of the City of New York,

Resondent-Appellees.

Before:

LUMBARD, *Chief Judge,*

CLARK, WATERMAN, MOORE and FRIENDLY, *Circuit Judges.*

Plaintiffs appeal from judgments rendered by the United States District Courts for the Southern and Eastern Districts of New York, Frederick vanPelt Bryan, *J.*, and Leo F. Rayfiel, *J.*, respectively, in two suits denying preliminary injunctions in actions seeking to prohibit state officers from divulging in state criminal trials evidence obtained by them

through the tapping of plaintiffs' telephone wires on the ground that introduction of such evidence would constitute a violation of §605 of the Communications Act of 1934, 47 U. S. C. §605. Judgments affirmed.

HERBERT S. SIEGAL, New York, N. Y., *for appellant Burton N. Pugach.*

EMANUEL REDFIELD, New York, N. Y., for the New York Civil Liberties Union, *amicus curiae.*

IRVING ANOLIK, Assistant District Attorney, Bronx County (Isidore Dollinger, District Attorney and Walter E. Dillon, Assistant District Attorney, Bronx County, on the brief), *for appellees Isidore Dollinger and Stephen P. Kennedy.*

LOUIS J. LEFKOWITZ, Attorney General, State of New York, Samuel A. Hirshowitz, First Assistant Attorney General, George K. Bernstein, Assistant Attorney General and Vincent A. Marsicano, Assistant Attorney General, *amicus curiae.*

Appendix A

LUMBARD, *Chief Judge*:

The question for decision is whether a federal court should enjoin state officers from divulging wiretap evidence in a state criminal trial, when introduction of this evidence will constitute the violation of a federal criminal statute. In the two cases before us Judges Bryan and Rayfiel both refused to grant injunctive relief, and we affirm their judgments.

In No. 306, *Pugach* v. *Dollinger*, appellant and several others were indicted in November 1959 by the State of New York for burglary in the second degree, maiming, assault in the second degree and conspiracy. Their case was set for trial on January 7, 1960. About two weeks before the trial was to begin appellant brought this suit in the Southern District of New York to enjoin the Bronx County District Attorney, the New York City Police Commissioner and their agents from making use at the state trial of evidence obtained by tapping appellant's telephone wires in June 1959 and of evidence obtained by the use of information overheard in the course of the tapping. The complaint alleged that, although the wiretap was obtained pursuant to state court authorization and in accordance with a statute, its divulgence would constitute a violation of §605 of the Communications Act of 1934, 47 U. S. C. §605. It further stated that wiretap evidence had been introduced before the grand jury in obtaining appellant's indictment and that the district attorney intended to make use of such evidence at trial. The district attorney has not denied that he expects to use wiretap evidence, nor does he contest appellant's allegations that appellant will be subject to irreparable injury if convicted by means of such evi-

dence. Judge Bryan, relying primarily upon *Stefanelli* v. *Minard*, 342 U. S. 117 (1951) declined to grant a preliminary injunction and dismissed the complaint. *Pugach* v. *Sullivan*, 180 F. Supp. 66 (S. D. N. Y. 1960). Upon motion by appellant, this court stayed introduction of the wiretap evidence, pending determination of the appeal.[1]

In No. 307, *O'Rourke* v. *Levine*, appellants are presently on trial in the Nassau County Court on an indictment charging them with conspiracy, extortion, attempted extortion and coercion. The selection of jurors began on February 1, 1960 and the taking of testimony started a week later. Suit in the Eastern District of New York to enjoin the introduction of wiretap evidence was commenced on February 16, 1960. The allegations of the appellants' bill are substantially the same as those in the *Pugach* case, though in *O'Rourke* the district attorney has stated on the record in the state court trial his intention to make use of wiretap evidence. Judge Rayfiel denied a preliminary injunction, distinguishing the grant of the stay pending appeal in Pugach on the ground that much greater disruption of the state court proceeding would result were the introduction of evidence in a trial already in progress enjoined. Both this court and subsequently Mr. Justice Harlan of the Supreme Court declined to stay the introduction of the wiretap evidence pending appeal.

We convened an *en banc* session of the court to hear these appeals.

---

[1] 2 Cir., Feb. 11, 1960, Slipsheet p. 731. There were three opinions. Judge Medina voted to grant the stay on grounds that would lead equally to the grant of an injunction. Judge Waterman concurred in the grant solely to preserve the status quo lest the case become moot before the appeal could be decided. Judge Madden of the Court of Claims, sitting with the Court by designation, dissented.

Appendix A

The jurisdiction of the district courts was properly founded upon §1337 of the Judicial Code, which states that "the district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce * * * " The Communications Act of 1934 is an "Act of Congress regulating commerce." See *Benanti* v. *United States*, 355 U. S. 96, 104-05 (1957); cf. *Mulford* v. *Smith*, 307 U. S. 38, 46 (1939). Since the asserted right to relief is based upon §605 of the Communications Act, a suit to protect the federal right against impairment by state officers is a suit "arising under" the federal statute. *A. F. of L* v. *Watson*, 327 U. S. 582, 590-91 (1946).[2]

---

[2] Whether jurisdiction may also lie under 28 U. S. C. §1343(3) we do not decide.

Section 1343 provides in part:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * * * * *
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege of immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States * * * "

In *McGuire* v. *Amrein*, 101 F. Supp. 414 (D. Md. 1951), the court held that it did not have jurisdiction of a suit identical in nature to that here under §1343(3), since §605 is not an "Act of Congress providing for equal rights of citizens" as that phrase is used in §1343(3). In *Stefanelli* v. *Minard*, 342 U. S. 117 (1951), the Supreme Court reserved the question whether jurisdiction lay under §1343(3) in a suit to enjoin the introduction of evidence in a state trial on the ground that the evidence was obtained by means of an unlawful search and seizure.

Appendix A

Section 605 of the Communications Act states in pertinent part: " • • • no person not being authorized by the sender shall intercept any communication and divulge the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person • • • " In *Nardone* v. *United States*, 302 U. S. 379 (1937) and 308 U. S. 338 (1939), the Supreme Court held that under §605 evidence obtained from wiretapping by federal officers was inadmissible in a federal court. In *Schwartz* v. *Texas*, 344 U. S. 199 (1952), upon direct review of a state criminal conviction it was held that the use of the same kind of evidence obtained by state officers was not prohibited by §605. The Court stated that it would not presume, in the absence of any clear manifestation of intent, that Congress intended to supersede a state rule of evidence permitting the introduction of evidence obtained by state officers and divulged in violation of a federal statute. Two years ago, in *Benanti* v *United States*, *supra*, the Court held that wiretap evidence obtained by state officers was not admissible in a federal court, although the evidence was procured in accordance with a New York state statute authorizing wiretapping pursuant to court order.[3] The Court reasoned

---

[3] Section 813-a of the New York Code of Criminal Procedure, under which the wiretap orders were issued in *Benanti* and in the cases before us states in part:

> "An ex parte order for the interception, overhearing or recording of telegraphic or telephonic communications may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the County of New York upon oath or affirmation of a district attorney, or of the attorney-general or of any officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained and iden-

that under §605 Congress intended to exclude from use in the federal courts evidence the divulgence of which would be unlawful, regardless of its source. Though the Court made clear that tapping coupled with divulgence was a violation of §605, even when done pursuant to state law, it carefully distinguished the decision in *Schwartz* v. *Texas*, *supra*.[4]

Appellants contend that we should enjoin the defendants from introducing wiretap evidence in the state court trials, since the divulgence of this evidence will violate §605. They contend that if we do not intervene, they will be subject to irreparable injury, because, if the evidence is introduced

---

tifying the particular telephone number or telegraph line, and particularly describing the person or persons whose communications are to be intercepted, overheard or recorded and the purpose thereof. * * * Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. * * *"

Section 813-a was originally enacted in 1942 pursuant to Art. 1, §12, para. 2 of the New York Constitution, adopted in 1938, which states:

> "The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof."

[4] Whether both a tapping and a divulgence are necessary for a violation of §605 was specifically reserved by the Supreme Court in *Benanti*. See 355 U. S. at 100 n. 5. Since both elements are involved here, we need not consider whether tapping alone is lawful

and they are found guilty their convictions will not be subject to reversal on appeal either under New York law, see *People* v. *Variano*, 5 N. Y. 2d 391, 185 N. Y. S. 2d 1 (1959), or federal law, *Schwartz* v. *Texas, supra.*

The exercise of the power of a federal court to grant equitable relief is a matter of discretion. In each case the court must balance the factors for and against the use of its power. See *Douglas* v. *City of Jeanette*, 319 U. S. 157 (1943). Here we think that the district courts properly concluded that the balance weighs against the exercise of the power to grant injunctive relief. We agree that in the circumstances of these two cases a federal court should not intervene in criminal prosecution by a state for violation of its criminal laws. See *Voci* v. *Storb*, 235 F. 2d 48 (3 Cir. 1956).

Both Congress and the Supreme Court have often indicated their concern for the preservation of the balance between the states' administration of their laws and the use of federal equity power by restriction or withholding of the power of the federal courts. See, e.g., 28 U. S. C. §§1342, 2283; *Stefanelli* v. *Minard, supra; Watson* v. *Buck*, 313 U. S. 387 (1941); *Maryland* v. *Soper*, 270 U. S. 9, 270 U. S. 36, and 270 U. S. 44 (1926). Moreover, Congress, in §501 of the Communications Act, has provided that violation of §605 shall be a misdemeanor,[5] and we have held that §605 creates a civil action for damages in favor of one whose line is tapped. *Reitmeister* v. *Reitmeister*, 162 F. 2d 691 (2 Cir. 1947). Finally, we cannot overlook the long

[5] Convictions have been upheld under §501 for violation of §605. E.g., *United States* v. *Gris*, 247 F. 2d 860 (2 Cir. 1957).

recognized principle of equity, based upon the policy of preserving the right to jury trial, that a court should not enjoin the commission of a crime. With these factors in mind, we do not think that a federal court should interfere with the prosecution of a state criminal proceeding in order to provide an additional means of vindicating any private rights created by §605.

We are guided in our determination by the decision of the Supreme Court in *Stefanelli* v. *Minard, supra.* There the Court held that a federal court should refuse to intervene in a state criminal proceeding to enjoin the use of evidence claimed to have been secured by an unlawful search and seizure contrary to the Fourth Amendment. The plaintiff's claim in *Stefanelli* was closely analogous to that made here—that since under *Wolf* v. *Colorado,* 338 U. S. 25 (1949), admission in a state court of evidence obtained by an unlawful search and seizure would not be ground for reversal of the conviction, a federal court should enjoin the introduction of such evidence. Mr. Justice Frankfurter's statement of the reasons for refusing injunctive relief in *Stefanelli* are equally applicable here:

> "The consequences of exercising the equitable power here invoked are not the concern of a merely doctrinaire alertness to protect the proper sphere of the States in enforcing their criminal law. If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law —with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue. Asserted uncon-

stitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution." (Footnotes omitted) 342 U. S. at 123-24.

It is urged that *Stefanelli* differs from the cases before us in that there the violation of federal law was the unlawful search itself, which had already taken place at the time of the suit for injunctive relief and which the federal court could therefore not prevent, while here the very act of divulging the evidence will constitute the commission of a federal crime. The distinction is not persuasive. The decision in *Stefanelli* was placed on no such narrow ground, but was the expression of a general policy against "piecemeal" intervention by the federal courts in state proceedings for the purpose of litigating collateral issues. Moreover, the fact that the divulgence of the evidence sought to be enjoined will constitute the commission of a crime is not significant, since the plaintiffs must prevail, if at all, by vindication of their own rights under §605, not by collateral enforcement of the rights of the United States to prosecute under §501. As the Supreme Court said in *Schwartz* v. *Texas, supra,* at page 201, "the introduction of the intercepted communications would itself be a violation of the statute" is "simply an additional factor for the state to consider in formulating a rule of evidence for use

in its own courts. Enforcement of the statutory prohibition in §605 can be achieved under the penal provision of §501."

Neither do we find it a persuasive ground of distinction that *Stefanelli* was an isolated case of federal law violation in New Jersey rather than what is called a consistent pattern in New York. Indeed, it could be argued that the constant conflicts that would be engendered between federal and state courts in an effort to deal with such a pattern would make this an *a fortiori case* for refusal to interfere. We have no reason to think that issuance of injunctions in these two cases would lead New York prosecutors to desist from this time forward from offering wiretap evidence in New York courts as permitted by the law of that state. On the contrary, the district courts would be flooded with suits for injunctions against the use of wiretap evidence and its alleged fruits in the state courts, with the consequent necessity of determining just what evidence was proposed to be introduced and whether the trial had reached such a stage that vindication of the federal right should be subordinated to practical considerations of state law enforcement; and all these determinations would be subject to appeal, with the prosecution obstructed in the meanwhile. Our respect for the supremacy clause is deep and abiding. But, as recognized in *Stefanelli* v. *Minard*, direct interference by federal courts in state criminal trials is quite a different matter from the analogies suggested by our brother Clark.

The stay granted by this court in *Pugach* v. *Dollinger* is vacated. The judgments are affirmed.

WATERMAN, *Circuit Judge*, concurring:

I concur in the result reached in both cases by the majority of the court; but I believe I should separately state certain individual views.

The injunction sought by petitioners in *O'Rourke et al.* v. *Levine* must be denied. A jury had been impaneled, trial had already begun, and some testimony had already been adduced, when the district court was importuned to affect future trial developments by an injunction order which, if granted, might limit the People's further proof. The disruptive complications that ensue when federal judicial power is exercised to interfere with a state court criminal trial after testimony has been received there clearly dictate that we affirm the action below. A proper respect for the relation of the United States to the States and the Courts of the States, under these circumstances permits, in my belief, no other result. If at trial it appears that Section 605 of the Federal Communications Act is violated by an unauthorized divulgence by a witness under oath of an intercepted communication the United States can enforce that violation against the witness by prosecuting him under §501 of that Act. In fact, as I read the opinion of the Chief Justice speaking for a unanimous court in *Benanti* v. *United States*, 355 U. S. 96, at 103-106, even thought the interception was authorized by a New York state wiretap order, the divulgence would be such a clear violation of the Federal Communications Act that federal prosecuting officers would be expected to so prosecute.

Though I also concur in the result the majority reaches in *Pugach* v. *Dollinger and Kennedy*, the problems pre-

sented to us in that situation are much more difficult to resolve. There trial is not under way, and an injunction issued by us in the exercise of our equity powers to preserve compliance with "the Supreme Law of the Land; * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding," will not disrupt a trial or create any confusion. Forbidding the introduction of wiretap testimony at a trial not yet begun would only serve to prevent counsel from introducing certain material; it would neither stay the criminal prosecution itself, nor embarrass the progress of a trial, nor require a mid-trial shift of strategy. And though New York, as well as the two other states in our Circuit, does not inquire how offered evidence was obtained, the quashing of wiretap evidence in advance of trial would not appear to be an unwarranted intrusion by us into State affairs inasmuch as the federal government has a very special interest in this field, an interest set forth by Congress in the Federal Communications Act with such thoroughness as to preempt the states from regulation save for certain stated exceptions not here applicable. *Benanti* v. *United States*, 355 U. S. 96, 103-106 (1957).

I receive the impression from reading the majority opinion that the majority, although having a deep and abiding respect for the supremacy clause, do not think that a federal court should ever interfere with the prosecution of a state criminal proceeding.

To such doctrine I cannot subscribe.

In order to preserve as best can be the pluralism of our form of government it is true that in the exercise of a proper judicial self-restraint we should ever hesitate to interfere with state criminal proceedings—even as here,

where it is claimed that unless we do interfere there will be open and overt violations of an Act of Congress.

But it is also true that though, as a general policy, we should refuse to act, there are "exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent • • • " Chief Justice Stone speaking for the Court in *Douglas* v. *City of Jeannette*, 319 U. S. 157 at 163.

Pugach v. *Dollinger* is an exceptional case, and it may well be that Judge Clark and Judge Medina are soundest in their approach to the problems it poses. I have hesitated to agree with them only because I have faith that there is no clear irreparable injury to Pugach at this time. I assume, *arguendo*, that divulgence of information obtained by wiretap at his Bronx County trial will do Pugach irreparable injury; but I am not willing also to assume that a New York state trial judge will permit such evidence to be admitted over the objection of defense counsel. After all, New York state judges, as we, were bound when they took office, to support the Constitution of the United States; and they are fully cognizant of Article VI, Clause 2 thereof:

> "2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Schwartz v. *Texas*, 344 U. S. 199 (1952), and *Benanti* v. *United States*, *supra*, make clear, and all the opinions of the court in the present case recognize, that divulgence of

the contents of a wiretap unless the divulgence is authorized by the sender will constitute a violation of Sections 605 and 501. It is therefore presumptuous to assume that any New York State trial judge will acquiesce to the commission of a crime against the United States in his presence in his courtroom by a witness testifying under oath.

Though I hope I have made myself clear that I expect that no evidence of intercepted communications will be admitted at trial and that it is principally because of this belief that I concur in the result reached by the majority, nevertheless if I believed otherwise I might still refuse to issue an injunction under the doctrine of *Douglas* v. *City of Jeannette*, *supra*. If the offered evidence is admitted, despite *Benanti*, *supra*, and if Pugach is convicted and his conviction is affirmed by the New York Court of Appeals—see *People* v. *Dinan*, 6 N. Y. 2d 715, 185 N. Y. S. 2d 806 (1959), *cert. denied*, 361 U. S. 839; *People* v. *Variano*, 5 N. Y. 2d 391, 185 N. Y. S. 2d 1 (1959)—even then that conviction is subject to review by the Supreme Court. This possibility of a final federal review of a federal question is perhaps enough so that under *Douglas* v. *City of Jeannette*, *supra*, Pugach may have an adequate remedy at law; and an injunction ought not to issue.

Where a state persistently sanctions violation of federal law, due process considerations may arise, see Judge Medina's concurring opinion in *United States ex rel. Graziano* v. *McMann*, 2 Cir. Feb. 11, 1960. As I indicated in my majority opinion in *Graziano*, I am unpersuaded for I believe *Schwartz* v. *Texas* to be controlling. But my opinion in that case is hardly the final one, and since Judge Medina's position is well-reasoned, it affords plaintiff some-

thing more than a faint prospect that his expected state conviction will be reviewable by the Supreme Court on certiorari. The precise question has never been decided, and in light of the dicta in *Salsburg* v. *Maryland*, 346 U. S. 545 (1954) and *Wolf* v. *Colorado*, 338 U. S. 25 (1948), the possibility of direct review is strong enough to justify my concurrence in the result reached by the majority. Nor should we overlook the possibility that the Supreme Court might grant certiorari to reconsider *Schwartz* v. *Texas*.

Furthermore, I should point out that I not only differ from the majority wherein they apparently suggest that a federal court should never interfere with a state criminal prosecution, but I also differ from them wherein they rely for their result upon the doctrine expressed in *Stefanelli* v. *Minard*, 342 U. S. 117 (1951). Without in the least detracting from the force of that opinion it is my belief that that case and its doctrine are alike inapplicable here. In *Stefanelli* whatever federal crime was present had been fully committed before the federal court was importuned to interfere with the State court proceedings. Here the threatened commission of federal crime is sought to be prevented by an application for relief to a federal court in advance of the occurrence. In the unlikely event a person were officially advised that his home was to be illegally searched by state officers on a particular date, I would suppose he could readily obtain injunctive relief from a federal court. It would be in this posture of affairs that the two situations would be similar.

One final point needs to be made. Normally it is not the province of a member of the federal judiciary to suggest to a United States District Attorney how he should perform his duties.

Appendix A

I point out that in oral argument before this court sitting *in banc* counsel for the Pugach respondent-appellees did not deny that it was planned to offer wiretap evidence at that trial, and thereby did not deny to five federal judges in open court an intent to commit a federal crime. If such a crime is committed and remains unprosecuted after it has been stated by the U. S. Supreme Court in *Schwartz* v. *Texas*, *supra*, at page 201, and by us here that the interests of the United States may be adequately protected through enforcement of the penal provisions of Section 501, there will have been a most extraordinary affront to this court. Accordingly I ask that the United States District Attorney for the Southern District of New York follow the proceedings in *People* v. *Pugach* with the closest attention. Similarly, I invite the attention of the United States District Attorney for the Eastern District of New York to the proceedings in *People* v. *O'Rourke, etc.*

CLARK, *Circuit Judge* (dissenting):

In its latest pronouncement upon the issue, the Supreme Court of the United States has refused to find exception for state officers from the sweeping federal ban on unauthorized interception and divulgence of "any communications," contained in §605 of the Federal Communications Act, 47 U. S. C. §605. Speaking through the Chief Justice of the United States, a unanimous Court finds "that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy." And it points out the failure of Congress

to grant exceptions, though strongly importuned to do so. *Benanti* v. *United States*, 355 U. S. 96, 105, 106.

Notwithstanding its decisive character, there is nothing surprising in the Court's statement; indeed, it would have been surprising had the Court said less. For the absolute character of the prohibition has been steadily emphasized over the years and the attempt to make the statute say less than it does has been conspicuously unsuccessful. So we must accept the interpretation that wire tapping, whether by state officers or by anyone else, is simply and shortly forbidden by federal law, subject to severe penalties of fine and imprisonment. 47 U. S. C. §501. Attack must therefore be limited to the need of new legislation because of its hampering effects on law enforcement if prosecuting officials cannot have the benefit of at least "controlled" wire tapping. Involved are surely weighty arguments of public policy which the legislative body should weigh.[1] But these arguments have not as yet prevailed with the only governmental agency having authority to act to modify the existing law, and I do not see how they can affect the responsibility of United States judges to enforce that law. Hence for us I see no escape but to start with the premise that we are faced with repeated open and acknowledged violations of federal law which we are assured will be continued until and unless federal authorities intervene.

---

[1] That the legislative is the correct and indeed the only approach to a solution is the tenor of a discriminating article by the Chairman of the New York Joint Legislative Committee to Study Illegal Interception of Communications. Savarese, *Eavesdropping and the Law*, 46 A. B. A. J. 263 (1960). See also Gerhart, *Let's Take the Hypocrisy Out of Wiretapping*, 30 N. Y. St. B. Bull. 268 (1958); Williams, *Wiretapping Should Be Liberalized*, 30 N. Y. St. B. Bull. 261 (1958).

Thus we have an absolute impasse going so far as to be almost ludicrous if the issue were not so fundamentally serious. It seems generally conceded that wire tapping is an evil thing, particularly when employed by criminal or underworld characters and their associates. Yet it has not been possible to enforce the law against such persons when at the same time it is not enforced against even more open violators, albeit with loftier motives.[2] Thus one restrained comment puts it mildly: "Weighing the individual's right to privacy against the need for effective detection of criminals, we are met with the kind of conflict of values which characterizes many areas of our law and our social organization. In the case of wire tapping, however, this competition of social interests has resulted in a dangerous stalemate—a failure to find a workable adjustment—which leaves Mr. Smith, the average citizen, at the mercy of the more ruthless in our population. For, despit the statutes and judicial decisions which purport to regulate wire tapping, today this practice flourishes as a wide-open operation at the federal, state, municipal, and private levels." Westin, *The Wire-Tapping Problem: An Analysis and a Legislative Proposal*, 52 Col. L. Rev. 165, 167 (1952).

Professor Westin goes on to point out (from a careful analysis of congressional hearings and other cited material) how this "stalemate" affects the lives and fortunes of ordinary citizens, as well as others, and how the criticized practice taps the conversation of public officials in every sort of government agency, of business men in business organiza-

[2] There appears to have been only one successful prosecution under the statute. *United States* v. *Gris*, 2 Cir., 247 F. 2d 860. James R. Hoffa was prosecuted and acquitted. See Savarese, *supra* note 1, at 266.

tions, of private persons for purposes as diverse as labor espionage or securing evidence of a wife's infidelity, and with schools or training centers for instructing telephone tappers.[3] More recently a detailed study sponsored by the Pennsylvania Bar Association Endowment shows much of wire tapping in action, with a description of "The Tools" and with detailed investigation particularly of police activities in several important metropolitan areas, including New York. See Dash, Schwartz and Knowlton, The Eavesdroppers 35 *et seq.* (1959). This suggests a much more prevalent practice than many officials have been willing to admit, although even the conceded number of ex parte court orders issued under the New York statutes appears quite adequate to show the pattern.[4] And other material of like effect is extensively available.[25]

---

[3] 52 Col. L. Rev. 165, 167, 168 (1952), quoted by Professor Donnelly of Yale in his careful article, *Comments and Caveats on the Wire Tapping Controversy*, 63 Yale L. J. 799 (1954).

[4] In *Wiretapping in New York*, 31 N. Y. U. L. Rev. 197 (1956), the figures for the orders received by the telephone company in New York City are given, viz., 1135 orders (good for 90 days) affecting 1954 wires for the year 1954 and 1013 orders affecting 1662 wires for the year 1953. The defendants take exception to the figures given by Mr. Justice Douglas, An Almanac of Liberty 355 (1954), but quote approvingly those given by Brown and Peer, *The Wiretapping Entanglement; How to Strengthen Law Enforcement and Preserve Privacy*, 44 Cornell L. Q. 175, 183 (1959), as being a total of 480 orders in New York City in 1952. In Dash, Schwartz and Knowlton, The Eavesdroppers 39 *et seq.*, 68, 69 (1959), the authors suggest that Mr. Justice Douglas' estimate properly refers to wire taps, not orders, and then, making their own estimate of from 16,000 to 29,000 wire taps a year, also suggest that the Justice's estimate is thus "closer to the truth than the figures submitted by the police to the Kings County prosecutor." More lately Mr. Dash has given an estimate of from 13,000

Appendix A

In sum it is beyond dispute that there is a general, indeed universal, custom of federal law violation. Now this is a distressing situation, made not less so that in the eyes of many worthy citizens it is required by the asserted exigencies of successful law administration. But it is not an unusual situation. For actually it is a clash between federal and state governmental policies. As such it is a recurring struggle in our history and quite possibly a necessary one to a federal form of government.[6] In the past we have found ways of meeting and solving the problem. Of course, there are several forms of remedy; but the one to which

---

to 20,000 wire taps per year. Hearing before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, U. S. Senate, 86th Cong., 1st Sess., pursuant to S. Res. 62, Pt. 3, Wiretapping, Eavesdropping, and the Bill of Rights, 520-521 (1960).

[5] Earlier citations are given by Professor Donnelly, in the article cited in note 3 *supra*. Later references appear in 57 Col. L. Rev. 1159 (1957); 26 Ford. L. Rev. 540 (1957); 31 N. Y. U. L. Rev. 197 (1956); 67 Yale L. J. 932 (1958); and Dash, Schwartz and Knowlton, The Eavesdroppers 443, 458 *et seq.* (1959), including also references to Congressional and New York state legislative hearings. See also the statements and articles by law professors and others in the Hearing cited *supra* note 4, at 566-714.

[6] See Demet, *A Trilogy of Massive Resistance*, 46 A. B. A. J. 294, 296 (1960):

> "As demonstrated, disobedience, disrespect and massive resistance to the mandates of the United States Supreme Court are relatively old historical concepts practiced by various of the Soverign States of the Union when it was felt the Court trespassed into spheres in which the various states had ideological and sociological views contrary to the edicts and mandates of the Court.
>
> "It is interesting to speculate what the state courts would have done if the segregation cases had reached the Supreme Court by way of state courts and not the federal courts."

there seems continual return when other remedies fail is the resort to the equity powers of the federal courts to enjoin repeated violations of the criminal law. This is an old and well established ground of equity jurisdiction, naturally to be resorted to only reluctantly as against state officials, but nevertheless thoroughly recognized. Thus the authority of United States courts to enjoin state officials, including prosecutors and others, from repeated violations of overriding federal law has long been upheld in a variety of circumstances such as alien land ownership, rate regulation, closed shop and railroad tariff laws, and the like. Thus, for example, see *American Federation of Labor* v. *Watson*, 327 U. S. 582; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 147 A. L. R. 674; *Watson* v. *Buck*, 313 U. S. 387; *Hague* v. *C. I. O.*, 307 U. S. 496; *Sterling* v. *Constantin*, 287 U. S. 378; *Terrace* v. *Thompson*, 263 U. S. 197; *Ex parte Young*, 209 U. S. 123; *Smyth* v. *Ames*, 169 U. S. 466, modified 171 U. S. 361. And see also *Rea* v. *United States*, 350 U. S. 214, upholding an injunction preventing a federal agent from transferring federally suppressed evidence to a state court or there testifying.

Directly in point also and perhaps most persuasive of all in view of the close analogy are the modern segregation cases. Thus see *Brown* v. *Board of Education of Topeka*, 347 U. S. 483, 38 A. L. R. 2d 1180, 349 U. S. 294; *Cooper* v. *Aaron*, 358 U. S. 1; *Harrison* v. *National Ass'n for the Advancement of Colored People*, 360 U. S. 167, 179; *Faubus* v. *United States*, 8 Cir., 254 F. 2d 797, certiorari denied 358 U. S. 829; *Clemons* v. *Board of Ed. of Hillsboro, Ohio*, 6 Cir., 228 F. 2d 853, certiorari denied *Board of Ed. of*

Hillsboro, Ohio v. *Clemons*, 350 U. S. 1006. As these cases all demonstrate, a suit against a state officer violating federal law is not within the prohibition of actions against a state. See also Judge Parker's complete statement in *School Bd. of City of Charlottesville, Va.* v. *Allen*, 4 Cir., 240 F. 2d 59, certiorari denied 353 U. S. 910.

All these questions of jurisdiction the majority opinion herewith concedes, including the irreparable injury sustained. I agree thoroughly with the principles here stated; but that leaves only *Stefanelli* v. *Minard*, 342 U. S. 117, and the question of the niceties of the exercise of federal equity jurisdiction left to give us pause. For *Stefanelli* recognizes the jurisdiction of equity and emphasizes only the restraint which the federal court should show against interfering with state criminal processes. I agree wholeheartedly, but ask (as was asked with respect to Little Rock schools, martial law in the Texas oil fields, and other historic federal-state clashes), When does enough of federal law violation become too much? The facts rehearsed above demonstrate in my opinion that only by the course of federal injunction will the present impasse be resolved. *Schwartz* v. *Texas*, 344 U. S. 199, shows that the way is not by appeal from a conviction already had; indeed it confirms the view that this is the one healthy and direct and complete solution. A clean excision is better than continuous mangling. Involved in *Stefanelli* was an isolated case of federal law violation, not a consistent pattern as here. Also to be noted is the less direct compulsion of the federal law there, since the Fourth Amendment does not touch the problem of communication and evidence directly; no federal crime was

there involved; and the damage had already been done.[7] Carefully considered I regard *Stefanelli* as authority showing the need and the utility of the action I urge, rather than to the contrary.

Consequently I am persuaded by and would follow the good opinion of Judge Medina upon the grant of a stay in this case. *Pugach* v. *Dollinger*, 2 Cir., Feb. 11, 1960. I also note that two state justices have reached a like conclusion and decline to proceed further in wire tapping. *Matter of Interception of Telephone Communications*, 9 Misc. 2d 121, 170 N. Y. S. 2d 84, Hofstadter, *J.*; *Application for an Order Permitting the Interception of Telephone Communications of Anonymous*, 207 Misc. 69, 136 N. Y. S. 2d 612, Hofstadter, *J.*; *Application for Order Permitting Interception of Telephone Communications*, 28 U. S. L. Week 2446 (N. Y. Ct. Gen. Sess., N. Y. C., March 7, 1960), Davidson, *J.*[8] These cases not only illustrate the uncertain and anomalous position into which state judges are now thrust, but also are good examples to United States judges. In the first case cited here, Mr. Justice Hofstadter makes a very pointed allusion to the mandate of the United States Constitution

---

[7] Hence for the exercise of a court's discretion there is a real difference between a completed case and one which is still pending, as we have held in *U. S. ex rel. Graziano* v. *McMann*, 2 Cir., Feb. 11, 1960. This difference might serve to distinguish the *O'Rourke* case here from that of *Pugach*. Thus, there is much more reason to refuse an injunction in *O'Rourke*. On the whole, however—except and unless the trial has proceeded further than was evident at our hearing—I do not believe the *O'Rourke* case has gone so far but that justice will be better served by the issuance of an injunction there also.

[8] So held also by Judge Rayfiel in *Burack* v. *State Liquor Authority of State of N. Y.*, D. C. E. D. N. Y., 160 F. Supp. 161.

that laws made pursuant to it are "the Supreme Law of the Land," binding upon us all, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U. S. Const. Art. VI, cl. 2. This reminder from a distinguished state brother of the necessity for obedience to the "Supreme Law" ought to go far to allay the fear expressed that the state officials will defy this law, even after it has been authoritatively defined in the course of this litigation, and that the federal courts will be flooded with actions to curb this defiance. For my part I entertain no such fear of either the defiance or the flood of cases; and hence I forego comment on the implication that mere number of applications may bar the right to equity relief. On the contrary I venture to believe that our state brothers and colleagues in law enforcement, both on the bench and in the prosecuting offices, will welcome definitive resolution of the present hopeless stalemate and will hasten to comply with the requirements of law as soon as they are made clear.

I would reverse the judgments below for the issuance of the injunctions sought.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

October Term, 1959.

(Motion argued February 1, 1960

Decided February 11, 1960.)

BURTON N. PUGACH,

Petitioner-Appellant,

—against—

HONORABLE ISIDORE DOLLINGER, District Attorney of Bronx County and
HONORABLE STEPHEN P. KENNEDY, Police Commissioner of the City of New York,

Respondent-Appellees.

Before:

MEDINA and WATERMAN, *Circuit Judges*, and MADDEN, *Judge*, United States Court of Claims.*

Motion by appellant for a stay.

HERBERT S. SIEGEL and LOUIS FUSCO, JR., Bronx, New York, *for petitioner-appellant.*

---

* Sitting by designation pursuant to the Provisions of 28 U. S. C. §291(a).

Appendix B

IRVING ANOLIK, Assistant District Attorney, Bronx County, New York (Isidore Dollinger, District Attorney, Bronx County, and Alexander E. Scheer, Assistant District Attorney, Bronx, New York, on the brief), *for respondent-appellees.*

MEDINA, *Circuit Judge*:

Burton N. Pugach and others were indicted by the Grand Jury of Bronx County, New York, charged with the crimes of burglary in the second degree, maiming, assault in the second degree and conspiracy. Another indictment charges Pugach with felonious possession of firearms. Proceedings are pending in the County Court of Bronx County and we are informed by the Assistant District Attorney in charge that "it will not be possible to delay this case beyond February 15."

The present action was brought in the United States District Court for the Southern District of New York against the District Attorney of Bronx County and the Police Commissioner of New York City for a permanent injunction restraining the use by them and their agents and employees in the forthcoming trial of certain wiretap evidence. A motion for a preliminary injunction was denied and the complaint was dismissed. Pugach appealed to this Court from the order denying the preliminary injunction and dismissing his complaint. The matter comes before us on a motion for a stay pending the hearing of the appeal.

It is not disputed that defendants or their agents on June 15, 1959 procured an order of the Supreme Court of the

State of New York permitting Pugach's telephone wires to be tapped, that they were tapped and that the contents of the wiretaps were divulged to the Grand Jury. It is also asserted and not denied that the wiretaps were divulged "to the press and to other persons." We agree with the statement by the District Judge: "It appears highly likely that the prosecution will use such evidence against plaintiff on the trial of the indictments." Indeed, the position of the District Attorney on this motion is not that no wiretap evidence will be used on the trial but rather that the order permitting the wiretap was authorized by Article I, Section 12 of the New York Constitution, by Section 813a of the New York Code of Criminal Procedure, and the evidence thereof held to be admissible in criminal prosecutions by the recent decisions of the New York Court of Appeals in *People* v. *Variano*, 1959, 5 N. Y. 2d 391, and *People* v. *Broady*, 1959, 5 N. Y. 2d 500; and he further contends that a federal court not only should not interfere with the use of such wiretap evidence but is without power or jurisdiction to do so. Under these circumstances we see no reason to doubt that the wiretap evidence will be used at the trial unless we take action to prevent such use.

Pugach's argument is: that Section 605 of the Federal Communications Act makes it a federal crime to tap a telephone and "divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication"; that defendants or their agents are about to commit this federal crime by further divulging and offering the wiretaps in evidence at the trial; that the Supreme Court has in effect held in *United States* v. *Benanti*, 1957, 355 U. S. 96, that the constitutional and legis-

lative authorization of wiretaps by the State of New York is illegal and void; that if the evidence is received at the trial and Pugach is convicted he will be wholly without remedy, since under *Schwartz* v. *Texas*, 1952, 344 U. S. 199, which is still in effect, the evidence will be admissible under the New York rules of evidence, even though illegally obtained, and his conviction will not be reversed. He also claims that the result of such violations of federal law will deprive him of his liquor license and his license to practice law. Pugach argues that, unless we grant the injunctive relief he prays, defendants and their agents will go ahead and violate the federal statute with impunity, shielding themselves behind a constitutional and legislative scheme of the State of New York that has been held by the Supreme Court to be invalid. This is a powerful argument and we have been unable to find any satisfactory answer to it.

It is interesting to note that on the same day the motion now under consideration was argued we also heard argument in *United States ex rel. Graziano* v. *McMann*, another wiretapping case. The regular New York procedure had been followed, the wiretap evidence was received at the trial and Graziano was convicted. The judgment of conviction was affirmed by the Appellate Division, 1957, 3 A. D. 2d 1010, and by the Court of Appeals, 1958, 4 N. Y. 2d 881. A motion to amend the remittitur to note that a question arising under the federal Constitution had been argued and decided was denied, 1958, 4 N. Y. 2d 1046, although Graziano had objected to the wiretap evidence and claimed it should not have been received as it violated the federal statute against intercepting and divulging telephone messages, and the Supreme Court denied certiorari, 1958, 358

U. S. 851. Thereafter Graziano applied for habeas corpus in the United States District Court for the Northern District of New York on the ground that his conviction violated his right to due process of law under the Fourteenth Amendment and the writ was dismissed. It was the appeal from the order dismissing the writ in *Graziano* that was argued before us on the same day Pugach's motion was argued. This Court has affirmed the order dismissing the writ in *Graziano* in an opinion filed herewith. This gives point to what may happen to Pugach if this motion is denied. In other words, once the federal law against wiretapping has been violated by state enforcement officers testifying at the trial to the contents of the wiretap, and a conviction has been obtained by use of such proof, the only remedy may well be a criminal prosecution against the enforcement officers who have violated the law or perhaps a civil suit by the convicted defendant for damages. That such remedies are hopelessly inadequate and that the convicted man will have suffered irreparable injury would seem to be self-evident. But here we can act in time to prevent the additional violation of Section 605 that will occur when the wiretap evidence is divulged and used at the trial.

In *United States* v. *Benanti*, 1957, 244 F. 2d 389, 391, we held:

> "Despite the warrant issued by the New York State court pursuant to New York law, we have no alternative other than to hold that by tapping the wires, intercepting the communication made by appellant and divulging at the trial what they had overheard, the

Appendix B

New York police officers violated the federal statute. Nardone v. United States, 302 U. S. 379, 58 S. Ct. 275, 82 L. Ed. 314; Id., 308 U. S. 338, 60 S. Ct. 266, 84 L. Ed. 307; Weiss v. United States, 308 U. S. 321, 60 S. Ct. 269, 84 L. Ed. 298. Section 605 of 47 U. S. C. A. is too explicit to warrant any other inference, and the Weiss case made its terms applicable to intrastate communications. The section provides:

> "* * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person * * *."

We also held, following as we thought the earlier cases, especially *Wolf* v. *Colorado*, 1949, 338 U. S. 25, that the fact that the federal officers had not participated in the wiretap and had no knowledge of it until the fact was brought out at the trial on cross-examination required us to affirm the conviction. In this we were mistaken, as the Supreme Court held the evidence was not admissible. *United States* v. *Benanti*, 1957, 355 U. S. 96. But our ruling[1] that the New York police officers had violated the federal law against divulging the contents of a wiretap, even though authorized by New York state law, was not disturbed. Instead, the Court held at pages 105-6:

> "In light of the above considerations, and keeping in mind this comprehensive scheme of interstate regulation and the public policy underlying Section 605 as

[1] See also *United States* v. *Gris*, 2 Cir., 1957, 247 F. 2d 860, 863.

part of that scheme, we find that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy.[18] ''

Footnote 18 reads:

''In passing, it should be pointed out that several Attorneys General of the United States have urged Congress to grant exceptions to §605 to federal agents under limited circumstances. See, *e.g.*, Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on H. R. 762, 867, 4513, 4728, 5096, 84th Cong., 1st Sess. 28; Rogers, The Case for Wire Tapping, 63 Yale L. J. 792 (1954). But Congress has declined to do so In view of this, it would seem unreasonable to believe that Congress is willing to allow this same sort of exception to state agents with no further legislation on its part.''

We find nothing to the contrary in *Schwartz* v. *Texas*, 1952, 344 U. S. 199, which merely construed Section 605 as precluding ''the conclusion that Congress intended to thwart a state rule of evidence in the absence of a clear indication to that effect.'' See *Benanti*, 355 U. S. at page 101. In other words, the rule of evidence that permits proof illegally obtained to be received in evidence is a rule of state law and, in the absence of valid federal legislation to the contrary, the application of such a rule in and of itself does not constitute a violation of the constitutional requirement of due process.

In denying relief the District Judge relied upon *Stefa-*

nelli v. *Minard*, 1951, 342 U. S. 117, where it was held that an injunction would not issue to prevent the New Jersey State Police from using in a state criminal prosecution the fruits of an unlawful search and seizure. But there the violation of the constitutional prohibition had already taken place. Under such circumstances it might well be thought that there was no more involved than a state rule to the effect that evidence illegally obtained was nonetheless admissible. Naturally there was a reluctance to interfere and disturb the delicate balance between federal and state functions, especially in the administration of the criminal laws. Here the very act of the police officers in testifying and divulging the contents of the wiretap will constitute the commission of a separate federal crime *in future*.[2] We do not think we lack power to prevent this. Unless we act now it may well be too late. Surely the delicate balance between federal and state functions does not require the federal courts to sit idly by and countenance or acquiesce in persistent and repeated violations of federal law. Moreover, the fact that the wiretapping is authorized pursuant to the Constitution and legislation of the State of New York, pursuant to which New York judges continue to order wiretapping and police officers do the wiretapping and divulge the contents of the wiretaps in their testimony, even after the Supreme Court has held these constitutional and legislative provisions to be an invasion of a field preempted by the Congress, makes the position of defendants even more untenable.

Accordingly, until the hearing and determination of the

---

[2] See *Refoule* v. *Ellis*, D. C. N. D., Ga., 1947, 74 F. Supp. 366, cited in footnote in *Stefanelli* at p. 124.

appeal from the order denying plaintiff's application for a temporary injunction and dismissing plaintiff's complaint, defendants and their agents and employees are hereby enjoined and restrained from using and disclosing wiretap evidence at the trial of Pugach in the County Court of Bronx County, New York, on the two indictments there pending against him.

WATERMAN, *Circuit Judge* (concurring):

I concur but solely on a very limited ground. If we deny the stay and the wiretap evidence is introduced at the trial next Monday, February 15, 1960, the important question presented by this application will not have been timely ruled upon, and, as appears in our opinion in *United States ex rel. Graziano* v. *McMann*, filed herewith, it is probable that nothing can be done thereafter to revive it. As soon as the wiretap evidence is offered and received at the trial and the contents of the wiretaps are thus divulged, the question now before us will have become moot. On the other hand, the granting of the stay will maintain the status quo pending appeal to our Court from the decision below. If we err in so doing, the stay will be promptly vacated by the United States Supreme Court, or a Justice thereof, and defendants will then be free to tender the wiretaps in evidence at the trial in the County Court of Bronx County. Although it is intolerable that the federal courts should so presume to interfere with the orderly progress of the administration of justice in the State Courts by issuing stay orders, the present situation is intolerable, too. It goes against the grain to sit idly

and await the violation of a federal statute one knows is to be violated, while also knowing that the only redress the United States may have after the violation is to proceed under §501 against a conscientious police officer who is only obeying orders.

Moreover, there is uncertainty among the State officers themselves. At least one of the Justices of the New York Supreme Court refuses to sign orders authorizing wiretaps on the ground that they are now clearly illegal under the ruling of the Supreme Court in *United States* v. *Benanti*, 355 U. S. 96 (1957). *Matter of Interception of Telephone Communications*, 9 Misc. 2d 121, 170 N. Y. S. 2d 84 (1958) (per Hofstadter, *J.*). But, as disclosed by the affidavits now before us, other Justices of the New York Supreme Court pursue a contrary course and numerous orders authorizing wiretaps are issued. This leaves in the middle conscientious New York State and municipal police officers who have tapped wires pursuant to court order. It could well be that some of them, as the occasion presented itself, might be prosecuted for violating Section 605 when they divulge or publish what they have thus obtained. Such a divulgence would be in violation of the plain prohibition of the Section. Therefore, if at all possible to do so, it is in the public interest to have the present anomalous state of affairs clarified. For this reason, and this reason alone —and with many misgivings—I concur in the granting of the stay. I would point out that we are not enjoining the prosecution itself, but only the introduction at the trial of wiretap evidence.

Appendix B

MADDEN, *Judge* (dissenting):

The petitioner-appellant's motion for stay of the criminal proceeding in the state court of New York assumes, correctly, that the New York Court will follow the New York rules of evidence, and will admit evidence obtained by tapping the petitioner's telephone.

The New York rule of evidence is,

> that the court, when engaged in trying a criminal case, will not take notice of the manner in which witnesses have possessed themselves of papers and other articles of personal property which are material and properly offered in evidence.

The foregoing quotation is from the opinion in *People* v. *Adams*, 176 N. Y. 351, 358, 68 N. E. 636, 638. It was quoted with approval in *People* v. *Richter's Jewelers*, 291 N. Y. 161; 51 N. E. 2d 690.

This rule of evidence is said by the petitioner to have been derived from the common law; to have been introduced into American jurisprudence toward the middle of the nineteenth century; and to have been adopted by a majority of American state jurisdictions.

The petitioner's estimate of the precedents is verified by *Wigmore on Evidence* (3rd Ed.), vol. 8, §§2183-2184b and *McCormick on Evidence*, §§137-142.

That the rule that wire-tap evidence is admissible is only a rule of evidence is confirmed by the highest authority, speaking in 1957, in *Benanti* v. *United States*, 355 U. S. 96, 101. There, Chief Justice Warren for a unanimous Court, distinguished *Schwartz* v. *Texas*, 344 U. S. 199, by saying:

> The rationale of that case is that despite the plain prohibition of Section 605 (the Federal Wiretapping Statute), due regard to federal-state relations precluded the conclusion that Congress intended to thwart a State rule of evidence in the absence of a clear intention to that effect.

What this Court is asked to do in the instant case is to hold that it is a violation of due process of law for a State to apply a rule of evidence which is the rule in a majority of the States of the United States. Can it be that the essentials of "ordered liberty" of decent and rational process of law have been hidden from so many courts and judges and juristic authorities during so many years, and have now at last been revealed, and only to this Court?

The instant petition urges the Federal District Courts to go into the business of supervising the proceedings in State Courts in their day-to-day activities; to take a seat on the bench beside the State Court Judge and direct him how to rule on the admission of evidence offered at the trial. It would be hard to imagine a more intolerable practice, even if it were indulged in by judges of higher rank, but in the same judicial hierarchy. Here again we have recent admonition from the Supreme Court of the United States. In *Stefanelli* v. *Minard*, 342 U. S. 117, Mr. Justice Frankfurter wrote for the Court in a case practically on all fours with the instant one. There the petitioners sought, in a Federal Court, an injunction against the use, in a State criminal proceeding, of evidence obtained by State police by an illegal search. The Supreme Court said, at page 120,

Here the considerations governing that discretion [the discretion of a Court of Equity in determining whether to issue an injunction] touch perhaps the most sensitive source of friction between States and Nation, namely, the active intrusion of the federal courts in the administration of the criminal law for the prosecution of crimes solely within the power of the States.

At pages 123-124 the Supreme Court said:

The consequences of exercising the equitable power here invoked are not the concern of a merely doctrinaire alertness to protect the proper sphere of the States in enforcing their criminal law. If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law —with its far flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution.

I would deny the requested stay.

APPENDIX C

UNITED STATES COURT OF APPEALS

For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of April, one thousand nine hundred and sixty.

Present:

Hon. J. Edward Lumbard,
Chief Judge.

Hon. Charles E. Clark,
Hon. Sterry R. Waterman,
Hon. Leonard P. Moore,
Hon. Henry J. Friendly,
Circuit Judges.

Burton N. Pugach,
Plaintiff-Appellant,

—v.—

Hon. Isidore Dollinger, District Attorney of Bronx County and Hon. Stephen P. Kennedy, Police Commissioner of the City of New York,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the appellees.

Further ordered that the stay heretofore granted by this Court on February 11, 1960 be and it hereby is vacated.

A. DANIEL FUSARO
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

BURTON N. PUGACH,

Petitioner-Appellant,

—v.—

HONORABLE ISIDORE DOLLINGER, District Attorney of Bronx County, and HONORABLE STEPHEN P. KENNEDY, Police Commissioner of the City of New York,

Respondent-Appellees.

MOTION FOR REHEARING AND STAY

The petition for rehearing is denied with Judge Clark dissenting and voting to grant.

In view of the appellant's intention to apply to the Supreme Court for certiorari, the defendants are enjoined from using and disclosing wiretap evidence until May 16, 1960, provided further that if on or before May 16, 1960 there is filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that a certiorari petition, record, and briefs have been filed, thereupon the stay shall

continue until the final disposition of the case by the Supreme Court. See Rule 28 of the Rules of this Court.

J. EDWARD LUMBARD
U.S.C.J.

STERRY R. WATERMAN
U.S.C.J.

LEONARD P. MOORE
U.S.C.J.

HENRY J. FRIENDLY
U.S.C.J.

I dissent.

CHARLES E. CLARK
U.S.C.J.

26 April 1960

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1959

No. 111

BURTON N. PUGACH,

Petitioner,

against

HONORABLE ISIDORE DOLLINGER, District Attorney of Bronx County, and HONORABLE STEPHEN P. KENNEDY, Police Commissioner of the City of New York,

Respondents.

RESPONSE TO PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI

ISIDORE DOLLINGER,
District Attorney, Bronx County,
Attorney for Respondents.

WALTER E. DILLON,
IRVING ANOLIK,
Assistant District Attorneys,
of Counsel.

INDEX

	PAGE
Statement of Case	1
The Complaint and Motion for a Temporary Injunction	2
The Factual Background	3
ARGUMENT:	
POINT ONE—Federal Courts should not intervene in State criminal proceedings to suppress the use of evidence. The orderly presentation of a case requires that the trial court shall determine the admissibility of any evidence sought to be introduced	3
POINT TWO—No constitutional question is involved in the present proceeding. The federal policy of excluding wiretap evidence is strictly a rule peculiar to trials in federal tribunals and is not binding upon the State Courts	9
Conclusion	10

Citations

CASES CITED:	
Benanti v. United States, 355 U. S. 96	9
Goldman v. United States, 316 U. S. 129	9, 10
Lee v. United States, 343 U. S. 747	10
Maguire v. Amrein, 101 F. Supp. 414	9
Martin, Matter of, 170 Misc. 919	8

PAGE

Olmstead v. United States, 277 U. S. 438 9
O'Rourke v. Levine, 4 L. Ed. 2d 615 10
People ex rel. Hirschberg v. Supreme Court, 269 N. Y. 392 8
People v. Variano, 5 N. Y. 2d 391 10
Rea v. United States, 350 U. S. 214 9
Schwartz v. Texas, 344 U. S. 199 9
Stefanelli v. Minard, 342 U. S. 117 ..... 3, 4, 10
Voci v. Storb, 235 F. 2d 48 10
Walder v. United States, 347 U. S. 62 6
Wolf v. Colorado, 338 U. S. 25 10

STATUTES:

N. Y. Code Crim. Pro. § 952-t 8

MISCELLANEOUS:

44 Cornell L. Q. 175 10

IN THE

Supreme Court of the United States

October Term, 1959

No.

BURTON N. PUGACH,

Petitioner,

against

HONORABLE ISIDORE DOLLINGER, District Attorney of Bronx County, and HONORABLE STEPHEN P. KENNEDY, Police Commissioner of the City of New York,

Respondents.

RESPONSE TO PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI

Statement

Petitioner seeks a writ of certiorari to review the decision of the United States Court of Appeals, Second Circuit, rendered April 14, 1960, which affirmed a judgment of the United States District Court for the Southern District of New York (Bryan, J.) entered on the 13th day of January, 1960 denying his application for a stay and granting respondents' cross-motion to dismiss the complaint.

The Complaint and Motion for a Temporary Injunction

Petitioner, Burton N. Pugach, a citizen of New York, alleges in his complaint that respondents and their agents, after securing an order from the Supreme Court of the State of New York permitting them to tap his wires, intercepted telephonic communications, thus obtaining certain information.

It is further alleged that respondents divulged the information obtained to the Grand Jury of Bronx County, as a result of which Pugach and three others were indicted for the crimes of Maiming, Burglary, Assault and Conspiracy. In another indictment, Pugach alone, was charged with a violation of Section 1897, subd. 5a, N. Y. Penal Law (possession of a loaded gun without a written license).

Pugach believes that respondents intend to use the evidence secured from the wiretaps upon the trial of the aforementioned indictments in the County Court, Bronx County. He claims that a conviction upon a trial at which the wiretap evidence is introduced will cause him irreparable damage such as the loss of his license to practice law and the revocation of a liquor license issued by the New York State Liquor Authority, besides subjecting him to personal punishment.

Since he assumes a disclosure by respondents of the wiretap evidence at the trial of the indictments in the County Court, Bronx County, will violate Section 605 of the Federal Communications Act, petitioner demands the following relief:

1. That respondents and their agents be prohibited and enjoined from proceeding against petitioner upon the indictments in the County Court, Bronx County, "on any grounds in which they may use wiretapping evidence, or on any grounds or investigations resulting from or instituted as a result of the aforesaid illegal wiretaps".

2. That respondents be directed to turn over to petitioner any and all wiretaps and recordings of the petitioner.

The papers in support of petitioner's motion for a temporary stay are substantially consistent with his complaint and add nothing significant thereto.

The Factual Background

Burton N. Pugach was indicted by the Grand Jury of Bronx County, charged with the crimes of Maiming, Burglary, Assault and Conspiracy, along with three other defendants. In another indictment Pugach was accused of the felonious possession of a loaded revolver. He has since been tried and convicted of the weapon violation.

The maiming count is predicated upon Pugach's alleged participation in the acid blinding of a young woman.

POINT ONE

Federal courts should not intervene in State criminal proceedings to suppress the use of evidence. The orderly presentation of a case requires that the trial court shall determine the admissibility of any evidence sought to be introduced.

In *Stefanelli* v. *Minard*, 342 U. S. 117, a parallel problem to the one at bar was presented for consideration. Justice Frankfurter, writing for the Court, declared (342 U. S. at p. 120):

> "We hold that the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure. The maxim that equity will not enjoin a criminal prosecution summarizes centuries of weighty experience in Anglo-American law. It is impressively reinforced

when not merely the relations between coordinate courts but between coordinate political authorities are in issue."

• • •

"The consequences of exercising the equitable power here invoked are not the concern of a merely doctrinaire alertness to protect the proper sphere of the States in enforcing their criminal law. If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution."

The wisdom of this Court's opinion in *Stefanelli* v. *Minard, supra,* has been demonstrated by the interference resulting from this action encountered by the People of the State of New York in their endeavor to prosecute criminal charges against petitioner unhindered by a determination, made in advance of the trial of the indictment, suppressing the use of evidence.

In November 1959, petitioner Pugach and three others were jointly indicted by the Grand Jury of Bronx County, State of New York, for burglary in the second degree, maiming, assault in the second degree and conspiracy. Their case was set for trial on January 7, 1960.

About two weeks before the trial was to begin and after extensive preparation had been made by the prosecu-

tion, petitioner brought the present action in the United States District Court, Southern District of New York. Together with the service of the complaint herein, petitioner noticed a formal motion for an injunction *pendente lite*. Respondents made a cross motion for the dismissal of the complaint.

The application came on to be heard before Judge Frederick Van Pelt Bryan, who then asked respondents to adjourn the State criminal trial to afford him ample time to consider the matter. In accordance with this request, the district attorney consented to a postponement of the trial in the County Court.

On January 13, 1960, Judge Bryan denied petitioner's application for the temporary injunctive relief and granted the cross-motion to dismiss the complaint.

An appeal from the judgment was then taken by petitioner to the United States Court of Appeals for the Second Circuit. On February 11, 1960, that Court (Medina and Waterman, J.J.—Madden, J. dissenting) granted a motion made by petitioner to restrain respondents, pending the determination of the appeal, from using and disclosing wiretap evidence at the trial of Pugach in the County Court, Bronx County, on the two indictments there pending against him.

On April 14, 1960, the United States Court of Appeals affirmed the judgment of the District Court and vacated the stay which had been granted on February 11, 1960.

On April 26, 1960, the United States Court of Appeals denied a rehearing but enjoined respondents from using and disclosing wiretap evidence until May 16, 1960 and provided further that if on or before said date there is filed a certificate of the Clerk of the Supreme Court that a certiorari petition, record and briefs have been filed, the stay shall continue until the final disposition of the case by the Supreme Court.

On May 16, 1960, an *ex parte* order was granted by two Judges of the United States Court of Appeals, enlarging the time of petitioner to file the aforementioned certificate up to and including May 31, 1960.

The petition having been filed within the extended period, the injunction is presently in effect and will continue until the matter is finally determined by this Court.

As a consequence, the trial of the State criminal action against Pugach and his three co-defendants, which was to start on January 7, 1960, has been delayed for the past five months. Respondent district attorney respectfully submits that the temporary injunctions suppressing evidence which have been granted by the Federal tribunal constitute an intolerable interference with the administration of justice in the State action.

Neither the district attorney nor any one else can foresee what situation might arise in the course of the trial of the State criminal action. It is not possible to tell what the state of the evidence might be during the progress of the trial or to know how petitioners might attempt to take advantage of the fact that certain evidence has been suppressed in advance of trial.

The case of *Walder* v. *United States*, 347 U. S. 62 furnishes an example of how an accused tried to take advantage of what he believed to be a rule of law which precluded the prosecutor from challenging his false testimony by evidence secured through an unlawful search and seizure.

All rulings as to the admissibility or suppression of evidence must necessarily be made by the trial court alone, subject, of course, to review upon appeal from the judgment. There cannot be an orderly presentation of a case where such determinations are made beforehand in an abstract way.

Petitioner's only concern in the instant action has been to secure in the Federal courts temporary injunctions to prevent the speedy and effective prosecution of the criminal charges. Surprisingly enough, he has succeeded in obtaining this drastic relief upon a complaint which has been dismissed and upon unsupported allegations of fact which he could not even hope to establish at a trial.

The present action was brought for a *permanent* injunction. This relief can be granted only after a trial of this suit in the United States District Court.

Respondent district attorney respectfully asks this Court to consider the serious consequences which would flow from the trial of this action, brought, as it was in the Federal court by a defendant under indictment in a State court against the State prosecutor before the trial of the criminal charge in the State court.

To permit an action of this kind to be maintained would virtually be tantamount to a declaration that persons indicted for crime by a State government may seek in a Federal tribunal a pretrial examination of the State prosecutor as to the evidence upon which the indictment was found and as to the evidence which the district attorney intends to introduce to prove the criminal charges.

In his complaint in the instant suit, Pugach alleged that the respondent-appellees intercepted telephonic communications by tapping his telephone wires and divulged the information thus obtained to the Grand Jury of Bronx County as a result of which he and three others were indicted for the aforementioned crimes.

Petitioner further alleged in his complaint that he *believes* that respondent-appellees intend to use the evidence secured from the wiretaps upon the trial of the indictments in the County Court.

Petitioner has never inspected the grand jury minutes and actually has no knowledge as to the evidence upon which the indictment was found. It is the policy of law that grand jury proceedings be held secret and that the minutes thereof be not revealed without an order of the trial court. (Section 952-t, Code of Criminal Procedure of the State of New York; *Matter of Martin*, 170 Misc. 919; *People ex rel. Hirschberg v. Supreme Court*, 269 N. Y. 392.)

In the circumstances the petitioner cannot prove through the testimony of the district attorney his allegation that wiretap evidence was divulged to the grand jury. Indeed, the district attorney would find himself in a dilemma in even pleading to this allegation of the complaint herein.

It is to be observed that the District Judge and the Court of Appeals treated the allegation of petitioner's complaint concerning the grand jury testimony and the allegations as to the belief of petitioner that wiretap evidence will be used at the trial as though these averments had been admitted by respondents. (Petitioner's Brief, pp. 41, 42.) This assumption stemmed from the fact that respondents did not deny either allegation because they could not divulge the grand jury evidence and because the prosecutor should not be required to disclose how he intends to prove the criminal charges.

These problems and the disruptions to the State criminal action which have already occurred would be over-shadowed by those that would be created by a trial of the instant suit. The interrogation by petitioner of the district attorney and the State's witnesses at a trial of this suit, which might reasonably be expected, would cause an unbearable condition. If actions of this kind were maintainable, the effective prosecution of crime on the local level would be seriously diminished.

POINT TWO

No constitutional question is involved in the present proceeding. The Federal policy of excluding wiretap evidence is strictly a rule peculiar to trials in Federal tribunals and is not binding upon the State courts.

At the outset, this Court's attention is directed to the fact that no constitutional issue is raised upon this proceeding. In *Olmstead* v. *United States*, 277 U. S. 438, this Court clearly indicated that the tapping of telephones does not constitute a violation of either the Fourth or Fifth Amendments to the United States Constitution. In more recent opinions, such as *Rea* v. *United States*, 350 U. S. 214, *Schwartz* v. *Texas*, 344 U. S. 199 and *Benanti* v. *United States*, 355 U. S. 96, this Court consistently ruled that the Constitution of the United States does not prohibit the use of wiretap evidence in State tribunals and that convictions based thereon do not constitute a deprivation of due process of law.

The case at bar does not embrace the exercise of supervisory powers over State law enforcement agencies. Moreover, it does not involve the suppression of testimony under a rule of evidence. This Court has held that the prohibition against wiretaps is a rule of evidence peculiar to the federal judiciary and does not encompass a violation of a constitutional right. (*Benanti* v. *United States*, *supra*; *Schwartz* v. *Texas*, *supra*.)

In *Goldman* v. *United States*, 316 U. S. 129, 133, it was held that Section 605 of the Federal Communications Act was intended to protect a means of communication and not to assure the secrecy of conversation.

See:

44 Cornell L. Q. 175, 181;
Maguire v. *Amrein*, 101 F. Supp. 414.

This Court has sustained convictions where eavesdropping devices have been used which were not tantamount to wiretrapping (e.g. *Lee* v. *United States*, 343 U. S. 747; *Goldman* v. *United States*, *supra*; cf: *O'Rourke* v. *Levine* [Harlan, J.] 4 L. Ed. 2d 615, 616).

Since it is patent that the issue of wiretapping, as such, is not involved in the present proceeding but only the question of whether the Federal Courts shall enjoin the use of certain evidence in State criminal proceedings it is submitted that the cases of *Wolf* v. *Colorado*, 338 U. S. 25 and *Stefanelli* v. *Minard*, *supra*, are dispositive of this issue and the petition for certiorari should be denied.

Cf: *People* v. *Variano*, 5 N. Y. 2d 391;
Voci v. *Storb* (3 cir.) 235 F. 2d 48.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

ISIDORE DOLLINGER,
District Attorney, Bronx County,
Attorney for Respondents.

WALTER E. DILLON,
IRVING ANOLIK,
Assistant District Attorneys,
of Counsel.

FILE COPY

Office Supreme Court, U.S.
FILED
OCT
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960

No. 111.

BURTON N. PUGACH,

Petitioner,

vs.

HONORABLE ISIDORE DOLLINGER, District Attorney of Bronx County, et al.,

Respondents.

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

GEORGE J. TODARO
Counsel for Petitioner
Office & P. O. Address
135 Broadway
New York 6, N. Y.

Case Press Inc., 82 Beekman St., N. Y. 7—BEekman 3-2005

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statute Involved	2
Statement	3
Summary of Argument	5
Argument	6
A. The Federal Court can and should enjoin state officials from using, at a trial, evidence obtained by State police in violation of Sec. 605 of the Federal Communications Act	6
B. Sec. 605 independently of Sec. 501 is a civil rights Statute protecting the right of privacy in telephonic communications of every person	17
C. The doctrine in *Schwartz* v. *Texas*, 344 U. S. 199 should be re-examined in the light of present conditions	18
Conclusion	19

Authorities Cited

Cases

Benanti v. U. S., 355 U. S. 96	5, 6
Elkin v. U. S., 264 U. S. 206	18
Nardone v. U. S., 302 U. S. 379	15
Nardone v. U. S., 308 U. S. 338	16

PAGE

Olmstead v. U. S., 277 U. S. 438 ..... 11, 18

People v. Broady, 1959, 3 N. Y. 2d 500 15
People v. Variano, 1959, 5 N. Y. 2d 391 15

Rea v. U. S., 350 U. S. 214 17

Schwartz v. Texas, 344 U. S. 199 ..... 6, 18

U. S. v. Gries, 2 Cir., 247 F. 2nd 860 9

Weiss v. U. S., 308 U. S. 321 5

Statutes

U. S. Const. Art VI, clause 2 6
28 U.S.C. 1337, 1343 ..... 1, 6, 17
47 U.S.C. 605 ..... 1, 2, 5, 6, 16, 17

Miscellaneous

Application for Order Permitting Interception of Telephone Communications, 28 U.S. L. Week 2446 15

Brown and Peer, The Wiretapping Entanglement; How to Strengthen Law Enforcement and Preserve Privacy, 44 Cornell L.Q. 175, 183 (1959) 10

Donnelly, Comments and Caveats on the Wire Tapping Controversy, 63 Yale L.J. 799 (1954) 10

Dush, Schwartz and Knowlton, The Eavesdropper 35 *et seq.* (1959) 10

Westin, The Wire Tapping Problem; An Analysis and a Legislative Proposal, 52 Col. L. Rev. 165, 167 (1952) 10

Wiretapping in New York, 31 N.Y.U. L. Rev. 197 (1956) 10

IN THE

Supreme Court of the United States

October Term, 1960

No. 111

BURTON N. PUGACH,

Petitioner,

—against—

HONORABLE ISIDORE DOLLINGER, District Attorney of Bronx County, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the Court of Appeals is reported at 277 F. 2d 739.

Jurisdiction

The judgment of the Court of Appeals was entered on April 14 1960 (R. 55).* A petition for rehearing was denied on April 26, 1960 (R. 56). The petition for a writ of certiorari was filed on May 28, 1960 and granted on June 27, 1960. The jurisdiction of this Court is invoked under 28 U. S. C. 1337, 1343.

* "R" refers to the record.

Question Presented

Whether in a state criminal prosecution the Federal Court can enjoin state officials from using and divulging, at a trial, evidence obtained by state police in violation of Sec. 605 of the Federal Communications Act.

Statute Involved

Section 605 of the Federal Communications Act of June 19, 1934, c. 652, 48 Stat. 1103, 47 U. S. C. 605:

> "No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person *not being authorized* by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of

another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

Statement

An indictment was returned against the petitioner, BURTON N. PUGACH, an attorney admitted to practice in the State of New York, and others, by the Grand Jury of Bronx County, New York, which indictment charged the petitioner with the crimes of burglary in the second degree, maiming, assault in the second degree and conspiracy. Another indictment charges petitioner with felonious possession of firearms.

The present action was brought in the United States District Court for the Southern District of New York against the District Attorney of Bronx County and the Police Commissioner of New York City for a permanent injunction restraining the use by them and their agents and employees on the forthcoming trial of certain wiretap evidence. A motion for a preliminary injunction was denied and the complaint was dismissed by the District Court.

Petitioner appealed to the Circuit Court of Appeals from the order denying a preliminary injunction and dismissing his complaint. Petitioner moved the Court of Appeals for a stay pending appeal. The motion was granted by order dated February 11, 1960 (R. 24). Which order stayed and enjoined the respondents "from using and disclosing wiretap evidence at the trial of Pugach in the County Court of Bronx County, New York, on the two indictments there pending against him in accordance with the opinion of this court" (R. 35). For the opinion of the Court of Appeals in granting stay pending appeal see (R. 25).

It is not disputed that the respondents, or their agents, on June 15, 1959, procured an order of the Supreme Court of the State of New York permitting Pugach's office telephone wires to be tapped; that they were tapped, and the contents of the wiretaps were divulged to the Grand Jury; and that the District Attorney intended to make use of such evidence at the trial. The District Attorney has not denied that he expects to use the wiretap evidence, nor does he contest petitioner's allegation that the appellant will be subject to irreparable injury if convicted by means of such evidence (See Statement of Facts in the opinion of Judge Medina (R. 24) and Judge Lumbard (R. 35).

Petitioner's contention is succinctly and clearly stated by Judge Medina wherein he states, as follows (R. 26):

> "Pugach's argument is: that Section 605 of the Federal Communications Act makes it a federal crime to tap a telephone and 'divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication'; that defendants or their agents are about to commit this federal crime by further divulging and offering the wiretaps in evi-

dence at the trial; that the Supreme Court has in effect held in *United States* vs. *Benanti*, 1957, 355 U. S. 96, that the constitutional and legislative authorization of wiretaps by the State of New York is illegal and void; that if the evidence is received at the trial and Pugach is convicted he will be wholly without remedy, since under *Schwartz* v. *Texas*, 1952, 344 U. S. 199, which is still in effect, the evidence will be admissible under the New York rules of evidence, even though illegally obtained, and his conviction will not be reversed. He also claims that the result of such violations of federal law will deprive him of his liquor license and his license to practice law. Pugach argues that, unless we gant the injunctive relief he prays, defendants and their agents will go ahead and violate the federal statute with impunity, shielding themselves behind a constitutional and legislative scheme of the State of New York that has been held by the Supreme Court to be invalid. *This is a powerful argument and we have been unable to find any satisfactory answer to it*" (Italics ours).

Summary of Argument

A. That Sec. 605 of the Federal Communications Act is a comprehensive scheme of interstate regulations, whose commands are not vague or uncertain. The prohibition of Sec. 605 apply to all communications, even those that are purely intrastate, *Weiss* v. *U. S.*, 308 U. S. 321, and they forbid not only intercepting the message, making use of the information intercepted but also divulging its existence, its substance, or its terms.

B. That in *Benanti* v. *U. S.*, 355 U. S. 96 this court held that congress setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict

that section and that policy. This in effect pre-empted the field and state statute in conflict with Sec. 605 must fall. U. S. Const. Act VI, clause 2. It would therefore appear that a tap made by police officers under the laws of the State of New York, did not have a semblance of legality to support it.

C. Sec. 605 standing by itself without the benefit of the punitive portion of Sec. 501, is essentially a civil right statute that can be enforced by injunctive proceedings. 28 U. S. C. 1337, 1343.

D. *Schwartz* v. *Texas*, 344 U. S. 199 should be re-examined and re-evaluated. It is obvious that since that case, wiretapping has become big business and has increased beyond the expectation of Judge Minton. It is not a question of whether congress intended to write a rule of evidence for the states but it is now apparent that under the *guise* of a rule of evidence, Sec. 605 has been for all purposes interred by the disobedience of state officials.

ARGUMENT

A. The Federal Court can and should enjoin state officials from using, at a trial, evidence obtained by State police in violation of Sec. 605 of the Federal Communications Act.

The problem before this Court is an old and venerable one. The conflict between State and Federal powers. *Benanti* v. *U. S.*, 355 U. S. 96, seemingly resolved this problem with respect to Sec. 605 of the Communications Act when it stated at pages 105-106, as follows:

> "In light of the above considerations, and keeping in mind this comprehensive scheme of interstate

regulation and the public policy underlying Section 605 as part of that scheme, we find, that Congress, setting out a prohibition in plain terms, did *not mean to allow state legislation which would contradict that section and that policy.*" (Italics ours)

Footnote 18 reads:

"In passing, it should be pointed out that several Attorneys General of the United States have urged Congress to grant exceptions to Sec. 605 to federal agents under limited circumstances. See, e.g., Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on H. R. 762, 867, 4512, 4728, 5096, 84th Cong., 1st Sess. 28; Rogers, The Case for Wire Tapping, 63, Yale L. J. 792 (1954). But Congress has declined to do so. In view of this, it would seem unreasonable to believe that Congress is willing to allow this same sort of exception to state agents with no further legislation on its part."

Further, Judge Medina, in his opinion (R. 30), stated as follows:

"Moreover, the fact that the wiretapping is authorized pursuant to the Constitution and legislation of the State of New York, pursuant to which New York judges continue to order wiretapping and police officers do the wiretapping and divulge the contents of the wiretaps in their testimony, even after the Supreme Court has held these constitutional and legislative provisions to be an invasion of a field *preempted by the Congress, makes the position of defendants even more untenable.*" (Italics ours)

Judge Waterman's opinion is also of interest when he states as follows (R. 31) at page 738:

"Moreover, there is uncertainty among the State officers themselves. At least one of the Justices of the

New York Supreme Court refuses to sign orders authorizing wiretaps on the ground that they are now clearly illegal under the ruling of the Supreme Court in *United States v. Benanti*, 355 U. S. 96 (1957). *Matter of Interception of Telephone Communications*, 9 Misc. 2d 121, 170 N. Y. S. 2d 84 (1958) (per Hofstadter, J.). But, as disclosed by the affidavits now before us, other Justices of the New York Supreme Court pursue a contrary course and numerous orders authorizing wiretaps are issued. This leaves in the middle conscientious New York State and municipal police officers who have tapped wires, pursuant to court order. It could well be that some of them, as the occasion presented itself, might be prosecuted for violating Section 605 when they divulge or publish what they have thus obtained. Such a divulgence would be in violation of the plain prohibition of the Section. Therefore, if at all possible to do so, it is in the *public interest to have the present anomalous state of affairs clarified.*" (Italics ours)

Judge Clark, in his dissenting opinion, stated as follows, (R. 48) at page 1414:

"In its latest pronouncement upon the issue, the Supreme Court of the United States has refused to find exception for state officers from the sweeping federal ban on unauthorized interception and divulgence of 'any communications,' contained in Sec. 605 of the Federal Communications Act, 47 U. S. C. Sec. 605. Speaking through the Chief Justice of the United States, a unanimous Court finds 'that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy.' And it points out the failure of Congress to grant exceptions, though strongly importuned to do so. *Benanti* v. *United States*, 355 U. S. 96, 105, 106.

Notwithstanding its decisive character, there is nothing surprising in the Court's statement; indeed, it would have been surprising had the Court said less. For the absolute character of the prohibition has been steadily emphasized over the years and the attempt to make the statute say less than it does has been conspicuously unsuccessful. So we must accept the interpretation that wire tapping, whether by state officers or by anyone else, is simply and shortly forbidden by federal law, subject to severe penalties of fine and imprisonment. 47 U. S. C. Sec. 501. Attack must therefore be limited to the need of new legislation because of its hampering effects on law enforcement of prosecuting officials cannot have the benefit of at least 'controlled' wire tapping. Involved are surely weighty arguments of public policy which the legislative body should weigh. But these arguments have not as yet prevailed with the only governmental agency having authority to act to modify the existing law, and I do not see how they can affect the responsibility of United States judges to enforce that law. *Hence for us I see no escape but to start with the premise that we are faced with repeated open and acknowledged violations of federal law which we are assured will be continued until and unless federal authorities intervene.*

Thus we have an absolute impasse going so far as to be almost ludicrous if the issue were not so fundamentally serious." (Italics ours)

It seems that generally speaking wire tapping is an evil thing, more so when employed by criminals. Yet it has not been possible to enforce the law against such persons when at the same time it has not been enforced against even more open violators though with loftier motives.[1]

[1] There appears to have been only one successful prosecution under the statute. *U. S.* v. *Gries*, 2 Cir. 247 F. 2nd 860.

Despite Sec. 605 and the judicial decisions that purport to regulate wire tapping today wire tapping is widespread, operating at the federal, state, municipal and private levels. See: Westin, The Wire Tapping Problem: An Analysis and a Legislative Proposal, 52 Col. L. Rev. 165, 167 (1952).

Professor Westin demonstrates how the tapper taps the conversation of public officials in every sort of government agency, of business men, of private persons for labor espionage, securing evidence of a wife's infidelity etc.[2]

Recently a study by the Pennsylvania Bar Association shows much of wire tapping in action with particularity with police activities in many areas, especially New York. This suggests the widespread practice employed by the police in New York, some of whose motives were not so commendable. See: Dash, Schwartz and Knowlton, The Eavesdropper 35 *et seq.* (1959).[3]

---

[2] 52 Col. L. Rev. 165, 167, 168 (1952), quoted by Professor Donnelly of Yale in his careful article, *Comments and Caveats on the Wire Tapping Controversy*, 63 Yale L. J. 799 (1954).

[3] In *Wiretapping in New York*, 31 N. Y. U. L. Rev. 197 (1956), the figures for the orders received by the telephone company in New York City are given, viz., 1135 orders (good for 90 days) affecting 1954 wires for the year 1954 and 1013 orders affecting 1662 wires for the year 1953. The defendants take exception to the figures given by Mr. Justice Douglas, An Almanac of Liberty 355 (1954), but quote approvingly those given by Brown and Peer, *The Wiretapping Entanglement; How to Strengthen Law Enforcement and Preserve Privacy*, 44 Cornell L. Q. 175, 183 (1959), as being a total of 480 orders in New York City in 1952. In Dash, Schwartz and Knowlton, The Eavesdroppers 39 *et seq.*, 68, 69 (1959), the authors suggest that Mr. Justice Douglas' estimate properly refers to wire taps, not orders, and then, making their own estimate of from 16,000 to 29,000 wire taps a year, also suggest that the Justice's estimate is thus "closer to the truth than the figures submitted by the police to the Kings County prose-

In the light of these so called legal taps the figures of the private professional tappers must be staggering and the right of privacy of telephonic communication despite Sec. 605 is for all purposes a figment of the imagination.

Perhaps at this point we should harken to the warning issued by Judge Brandeis in the case of *Olmstead* v. *U. S.*, 277 U. S. 438 at page 489:

> "In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously * * *
>
> If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it breeds anarchy."

Also, it might not be amiss to repeat from the dissenting opinion of Justice Holmes in the case of *Olmstead* v. *United States, supra*:

> "We have to choose, and for my part I think it less evil that some criminals should escape than that the government should play an ignoble part."

Further, Judge Clark, stated, at page 1417, as follows:

> "In sum it is beyond dispute that there is a general, indeed universal, custom of federal law violation. Now this is a distressing situation, made not less so that in the eyes of many worthy citizens it is required by the asserted exigencies of successful law administration. But it is not an unusual situ-

---

cutor." More lately Mr. Dash has given an estimate of from 13,000 to 20,000 wire taps per year. Hearing before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, U. S. Senate, 86th Cong., 1st Sess., pursuant to S. Res. 62, Pt. 3, Wiretapping, Eavesdropping, and the Bill of Rights, 520-521 (1960).

ation. For actually it is a clash between federal and state governmental policies. As such it is a recurring struggle in our history and quite possibly a necessary one to a federal form of government. In the past we have found ways of meeting and solving the problem. Of course there are several forms of remedy; but the one to which there seems continual return when other remedies fail is the resort to the equity powers of the federal courts to enjoin repeated violations of the criminal law. This is an old and well established ground of equity jurisdiction, naturally to be resorted to only reluctantly as against state officials, but nevertheless thoroughly recognized. Thus the authority of United States courts to enjoin state officials, including prosecutor and others, from repeated violations of overriding federal laws has long been upheld in a variety of circumstances such as alien land ownership, rate regulation, closed shop and railroad tariff laws, and the like. Thus, for example, see *American Federation of Labor* v. *Watson*, 327 U. S. 582; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 147 A. L. R. 674; *Watson* v. *Buck*, 313 U. S. 387; *Hague* v. *C. I. O.*, 307 U. S. 496; *Sterling* v. *Constantin*, 287 U. S. 378; *Terrace* v. *Thompson*, 263 U. S. 197; *Ex parte Young*, 209 U. S. 123; *Smyth* v. *Ames*, 169 U. S. 466, modified 171 U. S. 361. And see also *Rea* v. *United States*, 350 U. S. 214, upholding an injunction preventing a federal agent from transferring federally suppressed evidence to a state court or there testifying.

Directly in point also and perhaps most persuasive of all in view of the close analogy are the modern segregation cases. Thus see *Brown* v. *Board of Education of Topeka*, 347 U. S. 483, 38 A. L. R. 2d 1180, 349 U. S. 294; *Cooper* v. *Aaron*, 358 U. S. 1; *Harrison* v. *National Ass'n for the Advancement of*

Colored People, 360 U. S. 167, 179; *Faubus* v. *United* States, 8 Cir., 254 F. 2d 797, certiorari denied, 358 U. S. 829; *Clemons* v. *Board of Ed. of Hillsboro*, Ohio, 6 Cir., 228 F. 2d 853, certiorari denied *Board of Ed. of Hillsboro, Ohio* v. *Clemons*, 350 U. S. 1006. As these cases all demonstrate, a suit against a state officer violating federal law is not within the prohibition of actions against a state. See also Judge Parker's complete statement in *School Bd. of City of Charlottesville, Va.* v. *Allen*, 4 Cir., 240 F. 2d 59, certiorari denied 353 U. S. 910.

All these questions of jurisdiction the majority herewith concedes, including the irreparable injury sustained. I agree thoroughly with the principles here stated; but that leaves only *Stefanelli* v. *Minard*, 342 U. S. 117, and the question of the niceties of the exercise of federal equity jurisdiction left to give us pause. For *Stefanelli* recognizes the jurisdiction of equity and emphasizes only the restraint which the federal court should show against interfering with state criminal processes. I agree wholeheartedly, but ask (as was asked with respect to Little Rock schools, martial law in the Texas oil fields, and other historic federal-state clashes). When does enough of federal law violation become too much? The facts rehearsed above demonstrate in my opinion that only by the course of federal injunction will the present impasse be resolved. *Schwartz* v. *Texas*, 344 U. S. 199, shows that the way is not by appeal from a conviction already had; indeed it confirms the view that this is the one healthy and direct and complete solution. A clean excision is better than continuous mangling. Involved in *Stefanelli* was an *isolated* case of federal law violation, not a consistent pattern as here. Also to be noted is the less direct compulsion of the federal law there, since the Fourth Amendment does not touch

the problem of communication and evidence directly no federal crime was there involved; and the dam age had already been done. Carefully considered I regard *Stefanelli* as authority showing the need and the utility of the action I urge, rather than to the contrary.

Consequently I am persuaded by and would follow the good opinion of Judge Medina upon the grant of a stay in this case. *Pugach* v. *Dollinger*, 2 Cir. Feb. 11, 1960. I also note that two state justices have reached a like conclusion and decline to proceed further in wire tapping. *Matter of Interception of Telephone Communications*, 9 Misc. 2d 121, 170 N. Y. S. 2d 84, Hofstadter, J.; *Application for an Order Permitting the Interception of Telephone Communications of Anonymous*, 207 Misc. 69, 136 N. Y. S. 2d 612, Hofstadter, J.; *Application for Order Permitting Interception of Telephone Communications*, 28 U. S. L. Week 2446 (N. Y. Ct. Gen Sess. N. Y. C., March 7, 1960), Davidson, J. These cases not only illustrate the uncertain and anomalous position into which state judges are now thrust, but also are good examples to United States judges. In the first case cited here, Mr. Justice Hofstadter makes a very pointed allusion to the mandate of the United States Constitution that laws made pursuant to it are 'the Supreme Law of the Land,' binding upon us all, 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' U. S. Const. Art. VI, cl 2. This reminder from a distinguished state brother of the necessity for obedience to the 'Supreme Law' ought to go far to allay the fear expressed that the state officials will defy this law, even after it has been authoritatively defined in the course of this litigation, and that the federal courts will be flooded with actions to curb this defiance. For my part I entertain no such fear

> of either the defiance or the flood-of cases; and hence I forego comment on the implication that mere number of applications may bar the right to equity relief. On the contrary I venture to believe that our state brothers and colleagues in law enforcement, both on the bench and in the prosecuting offices, will welcome definitive resolution of the present hopeless stalemate and will hasten to comply with the requirements of law as soon as they are made clear."

The uncertainty and confusion that exists in the New York State Judiciary on this question, is manifested when an eminent Jurist of the Court of General Sessions, New York County, Davidson, *J.*, despite the ruling of the New York Court of Appeals, in the case of *People* v. *Variano*, 1959, 5 N. Y. 2d 391, and *People* v. *Broady*, 1959, 5 N. Y. 2d 500, on March 7th, 1960, refused to sign an order to permit a wiretap, in the matter of the "*Application for Order Permitting Interception of Telephone Communications*," 28 U. S. L. Week 2446.

Judge Davidson, in his opinion, stated:

> "Lawlessness by the police and the district attorney, who are sworn to uphold and enforce the law will not aid in the enforcement of the criminal law, nor will it heighten the respect of our citizens for our law."

In *Nardone* v. *U. S.*, 302, U. S. 379, at page 383, the Court stated as follows:

> "The answer to the question is one of *policy*. Congress may have though it less important that some offenders should go unwhipped of justice than that the officers should resort to methods *inconsistent with ethical standards and destructive of personal liberty.*" (Italics ours)

From the above it is apparent that Congress set fo
ethical standards for the *whole* people of the United Sta
including the people of the State of New York. There
no exceptions.

In the second *Nardone* case, *Nardone* v. *U. S.*, 308, U
338, at page 341, the Supreme Court stated as follows

> "The essence of a provision forbidding the acqu
> tion of evidence in a certain way is that merely
> evidence shall not be used before the Court, but
> it shall *not be used at all.* (Italics ours)
>
> A decent respect for the policy of Congress n
> save us from imputing to it a *self defeating, if*
> *disingenuous purpose.*" (Italics ours)

This language cannot be misinterpreted. Congress
passing Sec. 605 of the Federal Communications Act did
intend to pass a law that was *self defeating.* To permit
State of New York, or any other state, under the *guis*
evidentiary rules to violate this law with impunity wo
amount to nullification or destruction of the "ethical sta
ards" established by Congress, as representatives of
Federal Government and all of its people.

The issue presented by this case is thus one of first
pression and great importance. Concededly the use of w
tapping by state law enforcement officers is widespre
There is no way to determine the extent to which fed
officers are making use of state wiretaps, but there is ev
reason to believe that such use is also widespread.

It is thus apparent that the issue here presents an
portant and far reaching question in the field of fed
and state powers. The conflict must be resolved lest an

of Congress, such as Sec. 605 of the Federal Communications Act, be nullified and invalidated by the non-enforcement by the executive branch of the Federal Government, and the continuous and willful violation by the states.

B. Sec. 605 independently of Sec. 501 is a civil rights Statute protecting the right of privacy in telephonic communications of every person.

Sec. 605 was drawn with meticulous care whose language is crystal clear. The use of the words

> "*No person not being authorized by the sender* shall intercept any communications and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person".

"No person" means exactly what it says, that includes criminals, members of the police department of the State of New York or anyone else. It is a right that the citizens of the U. S. enjoy and it can be enforced by civil action and in a proper case, where there is no adequate remedy at law by injunction. See: *Rea* v. *U. S.*, 350 U. S. 214; 28 U. S. C. 1337, 1343.

It is interesting to note that the language of the Statute did not employ the term "It shall be illegal". The language of the statute clearly provides all the people of the U. S. with the right to injunctive relief in a proper case.

It is of interest to note the care used in drafting this statute by the exception provided at the end.

C. The doctrine in *Schwartz* v. *Texas*, 344 U. S. 199 should be re-examined in the light of present conditions.

Judge Minton when he wrote the opinion of the C in *Schwartz* v. *Texas*, 344 U. S. 199 was dealing with isolated interception of a telephone communication. To the widespread violation of Sec. 605 by state officials the use in state courts have for all purposes destroyed nullified that statute by wilfull disobedience of state offici *Schwartz* has encouraged state officials, district attorn and judges to become parties to a criminal act in the v Court room that is supposed to represent law and ord Under the guise of a rule of evidence and with the back of *Schwartz*, violation of this statute becomes a daily occ rence and disrespect for the law mounts.

In *Elkin* v. *U. S.*, 264 U. S. 206, the Court stated as follo at page 217:

> "The rule is calculated to prevent, not to repair. purpose is to deter, to compel respect for the c stitutional guaranty in the only effectively availa way, by removing the incentive to disregard it."

It is obvious that if this incentive is removed the dign of Congress of the United States, of our Courts and Courts of our states would be upheld and vindicated. do otherwise would lead to what Justice Brandeis sta and foresaw in *Olmstead* v. *U. S.*:

> "In a government of laws, existence of the gove ment will be imperilled if it fails to observe the l scrupulously * * *

If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it breeds anarchy."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the United States District Court and the judgment of the United States Court of Appeals should be reversed.

GEORGE J. TODARO
Counsel for Petitioner
Office & P. O. Address
135 Broadway
New York 6, N. Y.

October, 1960

FILE COPY

Office Supreme Court, U.S.
FILED
NOV 21 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

No. 111—October Term, 1960

BURTON N. PUGACH,

Petitioner,

against

ISIDORE DOLLINGER, District Attorney of Bronx County, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

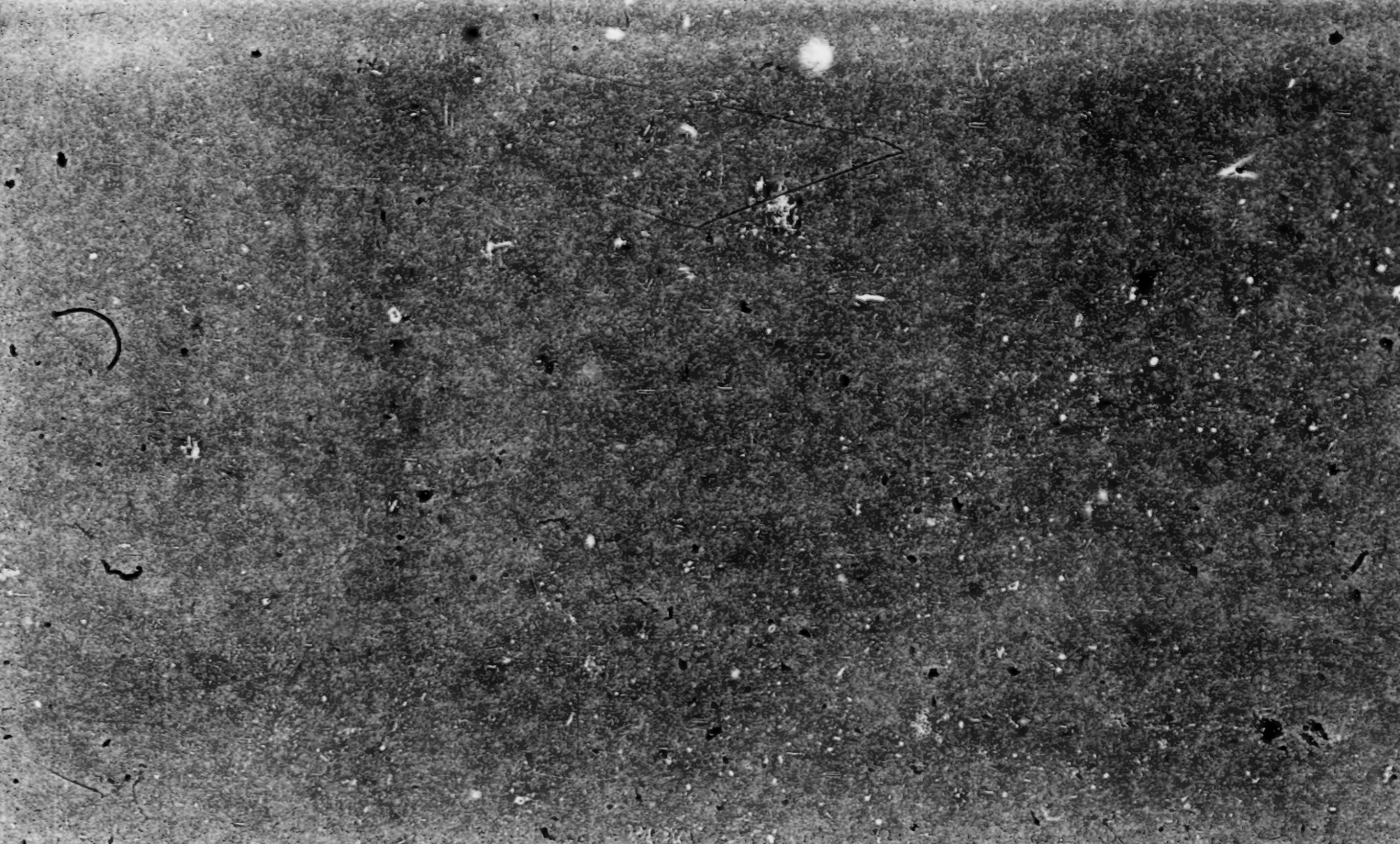
BRIEF ON BEHALF OF LOUIS J. LEFKOWITZ, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, *AMICUS CURIAE*, IN SUPPORT OF THE RESPONDENTS

LOUIS J. LEFKOWITZ,
Attorney General of the State of New York,
Amicus Curiae,
The Capitol,
Albany, New York.

PAXTON BLAIR,
Solicitor General,

JOHN M. COON,
Assistant Attorney General,
of Counsel.

BATAVIA TIMES LAW PRINTERS,
BATAVIA, N. Y.



INDEX.

	PAGE
Interest of the *Amicus Curiae*	1
Opinions Below	2
Constitutional Provisions and Statutes Involved	2
Questions Presented	5
Statement	6
Summary of Argument	7
Argument	7
POINT I. Federal Communications Act, § 605, as interpreted by decisions of this Court, does not bar the use of wiretap evidence in state courts. No reason has been shown in this proceeding for any alteration of those decisions	7
POINT II. Federal courts should not intervene in state criminal proceedings to suppress the use of evidence which this Court has held not to vitiate a conviction if admitted	13
Conclusion. The judgment of the United States District Court and the judgment of the United States Court of Appeals should be affirmed	21

CITATIONS.

Cases

Benanti v. United States, 355 U. S. 96 (1957)	7, 11, 12
Burack v. State Liquor Authority of State of New York, 100 F. Supp. 161 (D. C. E. D. N. Y., 1958)	17
Douglas v. Jeannette, 319 U. S. 157 (1943)	17
Irvine v. California, 347 U. S. 128 (1954)	10, 13, 18
Nardone v. United States, 302 U. S. 379 (1937)	10
Nardone v. United States, 308 U. S. 338 (1939)	11
Newfield v. Ryan, 91 F. 2d 700 (5th Cir. 1937)	19
Olmstead v. United States, 277 U. S. 438 (1928)	8, 9
On Lee v. United States, 343 U. S. 747 (1952)	9

PAGE

Pugach v. Dollinger, 275 F. 2d 503 (2nd Cir., 1960) 6, 16
Pugach v. Dollinger, 277 F. 2d 739 (2d Cir. 1960) 2, 14
Pugach v. Sullivan, 180 F. Supp. 66 (S. D., N. Y. 1960) 2, 14
Reitmeister v. Reitmeister, 162 F. 2d 691 (2d Cir. 1947) 19
Rochin v. California, 342 U. S. 165 (1952) 10
Schwartz v. Texas, 344 U. S. 199 (1952) 7, 11, 12, 13
Screws v. United States, 325 U. S. 91 (1945) 10
Stefanelli v. Minard, 342 U. S. 117 (1951) 15
United States v. Goldstein, 120 F. 2d 485 (2d Cir. 1941) 19
United States v. Gin, 247 F. 2d 860 (2d Cir. 1957) 19
Weiss v. United States, 308 U. S. 321 (1939) 11
Wolf v. Colorado, 338 U. S. 25 (1949) 10, 19

Constitutional Provisions

U. S. Constitution, Amendment X 3

Federal Statutes

Federal Communications Act of June 19, 1934, § 605 (47 U. S. C. § 605) 2, 5, 6, 7, 8, 9, 10, 11, 12, 13

State Statutes

New York Code of Criminal Procedure, § 813-a 1, 4, 6
New York Penal Law, § 738 3
New York Penal Law, § 739 4
New York Penal Law, § 743 1
New York Penal Law, § 745 1

IN THE

Supreme Court of the United States

No. 111—October Term, 1960

BURTON N. PUGACH,

Petitioner,

against

ISIDORE DOLLINGER, District Attorney of Bronx County, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON BEHALF OF LOUIS J. LEFKOWITZ, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, *AMICUS CURIAE*, IN SUPPORT OF THE RESPONDENTS

Interest of the *Amicus Curiae*

By seeking to enjoin the use of wiretap evidence in a State criminal proceeding, this action challenges a practice and rule of evidence authorized by the statutes of New York State (N. Y. Penal Law §§ 743, 745, N. Y. Code of Criminal Procedure § 813-a), and by court decisions of both this State and of the United States Supreme Court. This action further seeks to impose a federal rule of evidence

upon state courts, thus further limiting the powers reserved to the states by the federal Constitution. Section 71 of the Executive Law of the State of New York charges the Attorney General of this State with the duty of defending and upholding the constitutionality of State statutes. He is further authorized to appear on behalf of the State in all actions or proceedings in which it is interested. This brief is, therefore, filed in pursuance of these duties and in accordance with Rule 42 of this Court.

Opinions Below

The decision of the Court of Appeals, Second Circuit, issued on April 14, 1960, is reported at 277 F. 2d 739. The decision of the United States District Court for the Southern District of New York, issued January 13, 1960, is reported at 180 F. Supp. 66.

Constitutional Provisions and Statutes Involved

Federal Communications Act of June 19, 1934, § 605 (47 U. S. C. § 605):

> "No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person *not being authorized* by the sender shall intercept any com-

munication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

United States Constitution, Article X:

"Powers Not Delegated, Reserved to States and People Respectively.—The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

New York Penal Law, § 738 (McKinney's Consolidated Laws of New York, Book 39, Part 1, § 738):

"§ 738. EAVESDROPPING

A person:

1. not a sender or receiver of a telephone or telegraph communication who wilfully and by means of instrument overhears or records a telephone or telegraph communication, or who aids, authorizes, employs, procures or permits another to so do, without the consent of either a sender or receiver thereof; or

2. not present during a conversation or discussion who wilfully and by means of instrument overhears or records such conversation or discussion, or who aids, authorizes, employs, procures or permits another to so do, without the consent of a party to such conversation or discussion; or

3. who, not a member of a jury, records or listens to by means of instrument the deliberations of such jury or who aids, authorizes, employs, procures or permits another to so do; is guilty of eavesdropping."

New York Penal Law, § 739 (McKinney's Consolidated Laws of New York, Vol. 39, Part 1, § 739):

"§ 739. Exemption

There shall be exempt from the provisions of this article:

1. eavesdropping pursuant to an *ex parte* order granted pursuant to section eight hundred thirteen-a of the code of criminal procedure;

2. eavesdropping, as described in subdivision two of section seven hundred thirty-eight of this article, by a law enforcement officer pursuant to section eight hundred thirteen-b of the code of criminal procedure without an *ex parte* order obtained pursuant to section eight hundred thirteen-a of said code;

3. the normal operation of a telephone or telegraph corporation; and

4. the normal use of the services and facilities furnished by such corporation pursuant to its tariffs."

New York Code of Criminal Procedure, § 813-a (McKinney's Consolidated Laws of New York, Vol. 66, Part 3, § 813-a):

"§ 813-a. *Ex parte* order for eavesdropping

An *ex parte* order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any

justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overhead[1] or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same."

Questions Presented

Does § 605 of the Federal Communications Act have the effect of prohibiting the use in state courts of evidence presented in violation of that section, even though such use is authorized by state statutes and court decisions?

[1] So in original. Probably should be "overheard".

Does a prospective violation of § 605 constitute a situation in which the federal courts are justified in interfering with state court procedures by enjoining such a violation?

Statement

An indictment, returned by a Grand Jury of Bronx, County, New York, charged the petitioner with the crimes of burglary in the second degree, maiming, assault in the second degree and conspiracy, all crimes in violation of the penal statutes of the State of New York.

Respondents, or their agents, on or about June 15, 1959, procured an order of the New York Supreme Court, pursuant to New York Code of Criminal Procedure, § 813-a, permitting petitioner's office telephone wires to be tapped. The wires were so tapped and the contents of the wiretaps divulged to the Grand Jury. The District Attorney now proposes to use the wiretap evidence at the trial of the indictment.

The present action was brought by the petitioner in the United States District Court for the Southern District of New York against the District Attorney of Bronx County and the Police Commissioner of the City of New York for a permanent injunction restraining the use by them, on the forthcoming trial, of the evidence procured by the use of wiretaps. A motion for a preliminary injunction was denied and the complaint dismissed by the District Court.

An appeal was thereupon taken to the Court of Appeals, Second Circuit, and a motion made for a stay pending appeal. This latter motion was granted by order dated February 11, 1960 (275 F. 2d 503). However, on the merits of the appeal, the decision of the District Court, dismissing the complaint, was affirmed.

Petitioner contends that since this Court, in *Benanti* v. *United States* (355 U. S. 96 [1957]), held that the State statutory and constitutional authority for wiretaps is void, an injunction should be granted barring the use of such evidence at the trial, for if it is used he will be without remedy because under the rule of *Schwartz* v. *Texas* (344 U. S. 199 [1953]), the use of illegally obtained evidence in state criminal proceedings will not invalidate a conviction.

Summary of Argument

I. Federal Communications Act, § 605, is a provision of federal substantive law which was not intended by Congress to interfere with state court procedural rules, an interpretation which has been affirmed many times by this Court.

II. The federal equity power should not be employed to interfere with state court processes, by the imposition on state courts of federal rules of evidence and practice.

POINT I

Federal Communications Act, § 605, as interpreted by decisions of this Court, does not bar the use of wiretap evidence in state courts. No reason has been shown in this proceeding for any alteration of those decisions.

It is the contention of the Attorney General of New York, in this proceeding, that the past decisions of this Court have made it abundantly clear that the prohibition of divulgence of the contents of telephone messages, contained in Federal Communications Act, § 605, does not impose a rule of evidence upon the courts of the states which would prevent the use of wiretap evidence therein,

and further that those decisions which have imposed such a rule upon the federal courts and federal officers have clearly and carefully distinguished cases involving state courts. Petitioner in this proceeding has shown no persuasive or substantial reason for a new interpretation contrary to such long standing precedent.

It may be well to review here the development of the rules regarding the use of wiretap and other illegally obtained evidence. Prior to the enactment of the Federal Communications Act of 1934, wiretap evidence was being employed by federal officers in federal courts and its use approved by this Court upon the same reasoning that has since been applied to its use in state court proceedings.

In *Olmstead* v. *United States* (277 U. S. 438 [1928]), this Court considered the question of whether federal use of wiretapping violated the provisions of the Fourth and Fifth Amendments of the federal Constitution. In that case wiretapping by federal agents led to a discovery of a conspiracy to violate the National Prohibition Act. Holding that such acts did not constitute a violation of constitutionally guaranteed rights, this Court stated (pp. 465-466):

> "Congress may of course protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence. But the courts may not adopt such a policy by attributing an enlarged and unusual meaning to the Fourth Amendment."

That "common law of evidence" the Court described as follows (pp. 466-467):

> "The common law rule is that the admissibility of evidence is not affected by the illegality of the means by which it was obtained."

The necessity for direct legislation prohibiting the use of such evidence was demonstrated by the delineation of the policy considerations which prevented the courts from adopting their own rule in this regard. That policy was stated in these words (p. 468):

> "A standard which would forbid the reception of dence if obtained by other than nice ethical con-.uct by government officials would make society suffer and give criminals greater immunity than has been known heretofore. In the absence of controlling legislation by Congress, those who realize the difficulties in bringing offenders to justice may well deem it wise that the exclusion of evidence should be confined to cases where rights under the Constitution would be violated by admitting it."

Some years thereafter the Congress adopted the Federal Communications Act which predominantly related to federal preemptions of the control of radio broadcasting and telephonic communications. As a part of this statute, § 605 prohibited the divulgence of the contents of telephone messages without the consent of the sender. This Act provided the specific legislation referred to by the Court in the *Olmstead* case. That the basic principle relating to common law rules of evidence enunciated in that case has not been changed by either the statute or subsequent decisions of this Court, was amply demonstrated in 1952 on the decision of *On Lee* v. *United States* (343 U. S. 747). That case involved a conviction for the illegal sale of narcotics on the basis of evidence procured as a result of the use of electronic eavesdropping devices by federal narcotics agents. No violation of § 605 was involved. In affirming the conviction this Court stated (p. 755):

> "In order that constitutional or statutory rights may not be undermined, this Court has on occasion

> evolved or adopted from the practice of other courts exclusionary rules of evidence going beyond the requirements of the constitutional or statutory provision. *McNabb* v. *United States*, *supra* [318 U. S. 332]; *Weeks* v. *United States*, 232 U. S. 383. In so doing, it has, of course, departed from the common law rule under which otherwise admissible evidence was not rendered inadmissible by the fact that it had been illegally obtained. Such departures from the primary evidentiary criteria of relevancy and trustworthiness must be justified by some strong social policy. In discussing the extension of such rules, and the creation of new ones, it is well to remember the remarks of Mr. Justice Stone in *McGuire* v. *United States*, 273 U. S. 95, at 99: 'A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule.' "

The Court has continued, in its decisions, to follow the common law rule in regard to the admissibility in state courts of illegally obtained evidence, insofar as the methods employed in obtaining the evidence do not "shock the conscience" or "offend a sense of justice" and thereby directly involve violation of constitutionally protected rights (*Rochin* v. *California*, 342 U. S. 165 [1952]; *Wolf* v. *Colorado*, 338 U. S. 25 [1949]; *Irvine* v. *California*, 347 U. S. 128 [1954]; cf. *Screws* v. *United States*, 325 U. S. 91 [1945]). These cases involved violations by state officers of constitutionally protected rights, a situation not involved here.

When called upon to interpret the prohibition of § 605 in respect to the use of evidence, in violation thereof, in both federal and state courts, this Court adopted certain precise rules. In *Nardone* v. *United States* (302 U. S. 379 [1937]), the direct divulgence of the contents of intercepted telephone communications was prohibited to *federal officers*

in a *federal court* proceeding. In the second *Nardone* case (308 U. S. 338 [1939]) the indirect use of evidence obtained by wiretaps was prohibited to federal officers in federal court proceedings. *Weiss* v. *United States* (308 U. S. 321 [1939]) logically held that insofar as federal proceedings were involved, the prohibition of § 605 extended to the interception of both intrastate and interstate communications.

In *Schwartz* v. *Texas* (344 U. S. 199 [1952]) the Court was confronted by the problem of the use of evidence obtained by *state officers*, using wiretaps, in *state court* proceedings. It was contended that because this evidence would be inadmissible in federal courts, a conviction obtained in state courts by the use of such evidence would also be invalid. This argument, however, was rejected by this Court as it stated (p. 201):

> "Although the intercepted calls would be inadmissible in a federal court, it does not follow that such evidence is inadmissible in a state court. Indeed, evidence obtained by a state officer by means, which would constitute an unlawful search and seizure under the Fourth Amendment to the Federal Constitution is nonetheless admissible in a state court, *Wolf* v. *Colorado*, 338 U. S. 25, while such evidence if obtained by a federal officer would be clearly inadmissible in a federal court. *Weeks* v. *United States*, 232 U. S. 383. The problem under § 605 is somewhat different because *the introduction of the intercepted communications would itself be a violation of the statute, but in the absence of an expression by Congress, this is simply an additional factor for a state to consider in formulating a rule of evidence for use in its own courts.* Enforcement of the statutory prohibition in § 605 can be achieved under the penal provisions of § 501." [Emphasis supplied.]

In the light of the above language, the *Benanti* case (*Benanti* v. *United States*, 355 U. S. 96 [1957]) actually

added no new concepts to the rules already laid down by this Court. The only difference there was that the case involved evidence procured by state wiretaps introduced in federal courts. The Court there reiterated the rule previously enunciated in these words (p. 100):

> "The crux of those decisions is that the plain words of the statute created a prohibition against any persons violating the integrity of a system of telephonic communication and that evidence obtained in violation of the prohibition may not be used to secure a federal conviction. * * * We hold that the correct application of the above principle dictates that evidence obtained by means forbidden by § 605, whether by state or federal agents, is inadmissible in federal court."

As was pointed out in the opinion of the Court of Appeals, Second Circuit, in the instant case (277 F. 2d, at p. 742), the Court in *Benanti* carefully distinguished the decision in *Schwartz* v. *Texas*, stating (355 U. S. at pp. 101-102):

> "In the instant case we are not dealing with a state rule of evidence. Although state agents committed the wiretap, we are presented with a federal conviction brought about in part by a violation of federal law in this case in a federal court."

There has been, therefore, no departure by this Court from the principle consistently held that the inadmissibility of evidence in federal courts does not prescribe a rule of state procedure and that § 605 does not create a new rule of evidence for state courts. The rule still prevails that illegally obtained evidence may be used in state court proceedings.

Petitioner argues for a reversal of the rule by emphasizing the widespread use of wiretapping by local officials

in criminal investigations, implying that multiplicity of violations of § 605 must lead to a different rule—that by an increase in numbers of overall offenses, any single violation becomes that much more unethical. However, such reasoning is not persuasive. As this Court stated in *Irvine* v. *California*, *supra* (347 U. S. at pp. 133-134):

> "We are urged to make inroads upon *Wolf* by holding that it applies only to searches and seizures which produce on our minds a mild shock, while if the shock is more serious, the state must exclude the evidence or we will reverse the conviction. * * * We think, too, that a distinction of the kind urged would leave the rule so indefinite that no state court could know what it should rule in order to keep its processes on solid constitutional ground."

Quantity of violation is no criterion. If the violation of federal law offends the conscience of the Court in many cases it should offend it in one. But the courts have held that illegally obtained evidence may be admitted in state courts, including wiretap evidence, without regard to the frequency of violation of federal law by state officers. Petitioner's argument shows no reason why the rule should now be changed. This being so the rule of the *Schwartz* case should be reaffirmed.

POINT II

Federal Courts should not intervene in state criminal proceedings to suppress the use of evidence which this Court has held not to vitiate a conviction if admitted.

Petitioner contends that because a violation of § 605 constitutes a federal crime, the federal courts should interfere with state criminal proceedings to prevent a prospective commission of such a crime and further that § 605

constitutes a civil rights statute justifying interference with state courts by the use of the injunctive process.

As has often been indicated by the courts, one of the most delicate areas in maintaining the balance of our federal system is that of the administration of the courts. This concern has led the federal courts to generally refuse to intervene with state processes by the use of the federal equity power. It is essential to the preservation of the balance of power between the state and federal governments that there be reserved to the states autonomy in the administration of their courts and that the federal courts refuse to exercise general supervisory powers over the trial procedures of the states. This principle was recognized by both the Courts below in the instant case. The District Court wrote (180 F. Supp., at pp. 70-71):

> "Since the Benanti case there is little doubt that state officers who engage in telephone wiretaps and divulge the contents of communications so obtained not only are acting in violation of the federal statute but are committing a federal crime. * * *
>
> However, it does not follow that plaintiff is entitled to an injunction against the introduction of evidence so obtained at a state criminal trial. As was made abundantly clear in *Schwartz* v. *Texas*, *supra*, the question of whether such evidence is admissible in a state criminal trial has been left for the states to determine. * * *
>
> Plaintiff is not entitled to injunctive relief from this court. The federal courts will not exercise their equity powers to disturb the delicate balance of our federal system by interference with or embarrassment of criminal proceedings in the state courts."

Again, in affirming the District Court, the Court of Appeals, Second Circuit, stated (277 F. 2d, at pp. 742-743):

"Both Congress and the Supreme Court have often indicated their concern for the preservation of the balance between the states' administration of their laws and the use of federal equity power by restriction or withholding of the power of the federal courts. See, *e. g.*, 28 U. S. C. §§ 1342, 2283; *Stefanelli* v. *Minard*, *supra*; *Watson* v. *Buck*, 1941, 313 U. S. 387, 61 S. Ct., 962, 85 L. Ed. 1416; *State of Maryland* v. *Soper*, 270 U. S. 9, 46 S. Ct., 185, 70 L. Ed. 449; *Id.*, 270 U. S. 36, 46 S. Ct. 192, 70 L. Ed. 459 and 1926, 270 U. S. 44, 46 S. Ct. 194, 70 L. Ed. 462. Moreover, Congress, in § 501 of the Communications Act, 47 U. S. C. A. § 501, has provided that violation of § 605 shall be a misdemeanor, and we have held that § 605 creates a civil action for damages in favor of one whose line was tapped. *Reitmeister* v. *Reitmeister*, 2 Cir., 1947, 162 F. 2d 691. Finally, we cannot overlook the long recognized principle of equity, based upon the policy of preserving the right to jury trial, that a court should not enjoin the the commission of a crime. With those factors in mind, we do not think that a federal court should interfere with the prosecution of a state criminal proceeding in order to provide an additional means of vindicating any private rights created by § 605."

This very issue of an application for an injunction to restrain the use in state courts of illegally obtained evidence was directly raised in *Stefanelli* v. *Minard* (342 U. S. 117 [1951]), referred to in the opinion quoted above. This Court there stated (pp. 120, 123):

"For even if the power to grant the relief here sought may fairly and constitutionally be derived from the generality of language of the Civil Rights Act, to sustain the claim would disregard the power of courts of equity to exercise discretion where in a matter of equity jurisdiction, the balance is against the wisdom of using their power. Here the considerations governing that discretion touch perhaps the most sensitive source of friction between States and Nation, namely, the active intrusion of the federal courts in the administration of the criminal law for the prosecution of crimes solely within the power of the States.

> We hold that the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure. * * *
>
> The consequences of exercising the equitable power here invoked are not the concern of a merely doctrinaire alertness to protect the proper sphere of the States in enforcing their criminal law. If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law—with its far flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue."

This same concern for the disruption of state judicial processes was expressed by Judge MADDEN, dissenting from the granting of a temporary stay in the instant case, when he stated (275 F. 2d at pp. 508-509):

> "What this Court is asked to do in the instant case is to hold that it is a violation of due process of law for a State to apply a rule of evidence which is the rule in a majority of the States of the United States. Can it be that the essentials of 'ordered liberty' of decent and rational process of law have been hidden from so many courts and judges and juristic authorities during so many years, and have now at last been revealed, and only to this Court?
>
> The instant petition urges the Federal District Courts to go into the business of supervising the proceedings in State Courts in the day-to-day activities; to take a seat on the bench beside the State Court Judge and direct him how to rule on the admission of evidence offered at the trial. It would be hard to imagine a more intolerable practice, even if it were indulged in by judges of higher rank, but in the same judicial hierarchy."

Other cases involving issues of prime importance in the development of constitutional principles have nonetheless

expressed this same refusal to interfere with state court proceedings. In *Douglas* v. *Jeannette* (319 U. S. 157 [1943]), concerning as it did rights guaranteed under the First Amendment to the United States Constitution, this Court refused to enjoin a threatened state criminal prosecution, holding (pp. 162-163):

> "The power reserved to the states under the Constitution to provide for the determination of controversies in their courts may be restricted by federal district courts only in obedience to Congressional legislation in conformity to the judiciary Article of the Constitution. Congress, by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this court of any federal questions involved. Hence, courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent; * * *
>
> It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution on good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in a criminal case as in a suit for an injunction."

Any injury to the petitioner resulting from the use of wiretap evidence is not so "clear and imminent." The prospective loss of his State liquor license or his license to practice law in New York would not be a direct result of the use of this evidence as it was in *Burack* v. *State Liquor Authority of State of New York* (100 F. Supp. 161 [D. C.

E. D. N. Y., 1958]). Such consequences would be indirect results of his conviction, if any, of a crime in New York State. The admissibility of the evidence in cases such as this should not depend upon indirect and speculative consequences, but only upon direct results.

If the courts will not intervene in criminal prosecutions where a violation of constitutional rights is alleged, how much less should they intervene when only statutory violations, not constitutional guaranties, are concerned.

Other considerations leading to the justifiable reluctance of federal courts to intervene in state proceedings by imposing federal rules of evidence are clearly demonstrated in this Court's opinion in *Irvine v. California, supra*, where it is stated (pp. 134-137):

> "Whether to exclude illegally obtained evidence in federal trials is left largely to our discretion, for admissibility of evidence is governed 'by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.' Fed. Rules Crim. Proc., 26. As we have pointed out, reason has led state courts to differing conclusions, but about two-thirds of them to acceptance of the illegally obtained evidence. What actual experience teaches we really do not know. Our cases evidence the fact that the federal rule of exclusion and our reversal of conviction for its violation are not sanctions which put an end to illegal search and seizure by federal officers. * * * There is no reliable evidence known to us that inhabitants of those states which exclude the evidence suffer less from lawless searches and seizures than those of states that admit it. * * *
>
> It must be remembered that petitioner is not invoking the constitution to prevent or punish a violation of his federal right recognized in *Wolf* or to recover reparations for the violation. He is invoking it only to set aside his own conviction of crime. That the rule of exclusion and reversal results in the escape of guilty

persons is more capable of demonstration than that it deters invasions of rights by the police. The case is made, so far as the police are concerned, when they announce that they have arrested their man.[3] Rejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will, release the wrong-doing defendant. It deprives society of its remedy against one lawbreaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches. * * *

But the admission of the evidence does not exonerate the officers and their aides if they have violated defendant's constitutional rights. It was pointed out in *Wolf* v. *Colorado*, *supra*, that other remedies are available for official lawlessness, * * *"

The remedies above referred to include civil actions for damages (*Reitmeister* v. *Reitmeister*, 162 F. 2d 691 [2d Cir., 1947], citing *Newfield* v. *Ryan*, 91 F. 2d 700, 703 [5th Cir. 1937]; *United States* v. *Goldstein*, 120 F. 2d 485, 490 [2d Cir. 1941]), and federal criminal prosecutions for violation of the statute (*United States* v. *Gin*, 247 F. 2d 860 [2d Cir. 1957]).

As this Court pointed out in *Wolf* v. *Colorado*, *supra*, these other remedies are of greater importance in that they also serve to protect the innocent person whereas the remedy of injunction would protect only those against whom incriminating evidence had been uncovered. In that case the Court stated (338 U. S., at pp. 30-33):

"The jurisdictions which have rejected the *Weeks* doctrine have not left the right to privacy without other means of protection. Indeed, the exclusion of evidence is a remedy which directly serves only to protect those upon whose person or premises something incriminating has been found. We cannot, therefore, regard it as a departure from basic standards to

remand such persons, together with those who emerge scatheless from a search to the remedies of private action and such protection as internal discipline of the police, under the eyes of an alert public opinion, may afford. Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective. * * * We cannot brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent remedy not by way of disciplinary measures but by overriding the relevant rules of evidence. There are, moreover, reasons for excluding evidence unreasonably obtained by the federal police which are less compelling in the case of police under State or local authority. The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of the police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country."

All these considerations clearly demonstrate the wisdom of the policy of non-interference in state criminal proceedings by federal courts. Petitioner has not shown any overriding considerations which would warrant the overturning of this policy and the injection of federal supervision into the field of state judicial processes. It is submitted that the interests of our federal system of government are best served by the preservation of the independence of the state courts and that the decisions of the Court below should, therefore, be affirmed.

CONCLUSION

The judgment of the United States District Court and the judgment of the United States Court of Appeals should be affirmed.

Dated: November 15, 1960.

Respectfully submitted,

LOUIS J. LEFKOWITZ,
Attorney General of the State
of New York,
Amicus Curiae,
The Capitol,
Albany, New York.

PAXTON BLAIR,
Solicitor General,

JEAN M. COON,
Assistant Attorney General,
of Counsel.

E-COPY

MOTION FILED NOV [illegible] 1960

IN THE

Supreme Court of the United States

October Term, 1960

DOCKET No. 111

BURTON N. PUGACH,

Petitioner,

—against—

HONORABLE ISIDORE DOLLINGER, District Attorney of Bronx County, and HONORABLE STEPHEN P. KENNEDY, Police Commissioner of the City of New York,

Respondents.

MOTION FOR LEAVE TO FILE and BRIEF FOR THE NEW YORK CIVIL LIBERTIES UNION and the AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE*

EMANUEL REDFIELD
Counsel, Amici Curiae
60 Wall Street
New York 5, New York
HA-2-1023

CASE PRESS INC., 82 Beekman St., N. Y. — BEekman 3-2005

TABLE OF CONTENTS

	PAGE
Motion for Leave to File	1
Statement of Interest	3
Violation of the Federal Law Is Clear and Undisputed	4
The Petitioner Has No Remedy Other Than by an Injunction in This Action	5
A Federal Court Should Exercise Its Power to Grant the Injunction	6

AUTHORITIES CITED

Cases Cited

Black v. Impelliterri, 201 Misc. 371; affd. 281 A. D. 671; appeal dismissed, 305 N. Y. 724	2, 3, 5
Boske v. Comingore, 177 U. S. 459	7
Brown v. Board of Education, 347 U. S. 483	6
Burack v. Liquor Authority of New York, 160 Fed. Supp. 161	6
Cavanaugh v. Looney, 248 U. S. 453	6
Dreyer v. Illinois, 187 U. S. 71	6
Hague v. CIO, 307 U. S. 496	6
Hoffman v. O'Brien, 88 F. Supp. 490	3, 5
Home Telephone & Telegraph Co. v. Los Angeles, 227 U. S. 278	6
People v. Defore, 242 N. Y. 13	3, 5
People v. Exum, 7 N. Y. (2) 766	5
People v. Roth, 207 Misc. 875	8
People v. Variano, 5 N. Y. 2d 391	3, 5

PAGE

Rea v. United States, 350 U. S. 214 6
Reitmaster v. Reitmaster, 162 Fed. (2) 691 (2nd C.C.A.) 6
Royall, Ex parte, 117 U. S. 241 7

Schwartz v. Texas, 344 U. S. 199 5
Silfa, Matter of, v. Kennedy, 5 Misc. (2) 375; 3 App. Div. (2d) 818; 3 N. Y. (2d) 374 8
Stefanelli v. Minard, 342 U. S. 117 7
Sterling v. Constantin, 287 U. S. 378 6

Terrace v. Thompson, 263 U. S. 197 6
Truax v. Raich, 239 U. S. 33 6

United States v. Benanti, 355 U. S. 96 ..... 2, 3, 4

Weeks v. United States, 232 U. S. 383 9

Young, Ex parte, 209 U. S. 123 6

Statutes and Rules

Federal Rules of Criminal Procedure, Rule 41-e 9

New York Code of Criminal Procedure, Sec. 813-a .. 4

New York Constitution, Art. 1, Sec. 12 4

IN THE

Supreme Court of the United States

October Term, 1960

DOCKET NO. 111

BURTON N. PUGACH,

Petitioner,

—against—

HONORABLE ISIDORE DOLLINGER, District Attorney of Bronx County, and HONORABLE STEPHEN P. KENNEDY, Police Commissioner of the City of New York,

Respondents.

MOTION FOR LEAVE TO FILE and BRIEF FOR THE NEW YORK CIVIL LIBERTIES UNION and the AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE*

Motion for Leave to File

EMANUEL REDFIELD certifies that he is counsel for the New York Civil Liberties Union and has been requested by the American Civil Liberties Union, its national body to apply on its behalf for leave to jointly file a brief as *amici curiae*, urging the reversal of the judgment of the Court of Appeals.

When this case was before the Court of Appeals, that Court upon oral application granted the application of the New York Civil Liberties Union to file a brief. A brief

was thereafter filed and is so noted in the published opinion of the court. 277 Fed. 2d 739 at 740.

These organizations for a long time have been interested in advancing the effective enforcement of the federal laws against the interception of telephonic communications. Long before the *Benanti* decision of this court they had contended that the federal law on the subject as the supreme law of the land prevailed over any state law that permitted such practices. An example of such contention is found in *Black* v. *Impelliterri*, 201 Misc. 371; 305 N. Y. 724.

It is therefore requested that leave be granted to said organizations to jointly file a brief as *amici curiae*.

Respectfully submitted,

.....

Emanuel Redfield

Statement of Interest

The Civil Liberties Union for a long time has fought against the evil of wiretapping. It has recognized along with the Congress of the United States that it is an invasion of the privacy of persons, and that it is an evil for such an invasion to exist. It has contended that the New York statute and Constitutional provision that permits wiretapping is a violation of and in conflict with the paramount power of Congress in that field.

Recently this Court confirmed that position in *United States* v. *Benanti*, 355 U. S. 96. Although the Court declared the New York law conflicts with paramount federal law, nevertheless wiretapping persists in the State. Undoubtedly, those who engage in violating the federal statute do so because the *Defore* rule in New York (*People* v. *Defore*, 242 N. Y. 13), as recently reaffirmed with respect to wiretapping in *People* v. *Variano*, 5 N. Y. 2d 391, encourages the violation of law by law enforcement officers, for the courts in New York will not pause to inquire into the manner evidence was obtained.

The search has therefore turned toward discovering a remedy that will enforce compliance with federal law. None has effectively succeeded. *Hoffman* v. *O'Brien*, 88 F. Supp. 490; *Black* v. *Impelliteri*, 201 Misc. 371; affd. 281 A. D. 671; appeal dismissed, 305 N. Y. 724 (a taxpayer's action against municipal officials to enjoin the use of public funds for wiretap equipment and personnel); *People* v. *Variano*, *supra*, an attempt to exclude such evidence in a criminal trial, which if successful would have been some means of discouraging wiretapping.

The instant case is cast with that background. The paramount federal law is openly flouted under the dubious authority of State law, yet no effective remedy exists. It is worth no more than mention that the federal provision for prosecution of violators and actions for damages are illusory.

Therefore, the present action presents a feasible solution for at least preventing the use of the evidence in a trial against the person whose privacy had been illegally invaded. Although it will not completely halt unlawful wiretapping, it will serve to discourage its rampant use.

Violation of the Federal Law Is Clear and Undisputed

This case brings into sharp focus the conflict presented by the open violation of federal law by state officials. Section 605 of the Federal Communications Act forbids the interception and divulging of telephonic communications. The *Benanti* case clearly declares that the proscription of the Federal law applies to state officials. Yet, the New York Constitution Art. 1, Sect. 12 authorizes wiretaps and Section 813-a of the New York Code of Criminal Procedure implements such practice.

Thus, the conflict by express law is manifest.

Nor has the New York statute been merely an idle statement of policy. That the practice of interceptions by New York officers is rampant has been noted in the Court of Appeals, 277 Fed. 2d 739, 748 note 4. The compilation of the figures of the wiretaps should serve as a reminder that each tap is a violation of federal law.

And upon the argument in this case in the Court of Appeals the District Attorney unabashedly asserted (as if to confirm the accepted practice), that the wiretaps in this case will be used in the prosecution of the petitioner (at page 746).

The Petitioner Has No Remedy Other Than By An Injunction In This Action

Since the respondents have conceded the existence of the taps and the intention to use them at the trial, no remedy against their use remains to petitioner, unless the respondents are restrained.

State law, *People* v. *Defore*, 242 N. Y. 13, whose doctrine was recently affirmed by that Court in *People* v. *Variano*, 5 N. Y. 2d 391; *People* v. *Exum*, 7 N. Y. (2) 766, will not bar the admissibility of such evidence at the trial in state courts, contrary to the optimism expressed by Judge Waterman, below. And as long as *Schwartz* v. *Texas*, 344 U. S. 199 abides as the doctrine of this Court (may the instant case be an additional inspiration for its demise!), the petitioner will not be able to challenge the unlawful acts of the respondents' agents in the federal courts.

Thus, the petitioner is without a remedy. And attempts to find other remedies against the repeated violation of Section 605 have not succeeded. *Hoffman* v. *O'Brien*, 88 F. Supp. 490; *Black* v. *Impelliterri*, 201 Misc. 371; affd. 281 A. D. 671; appeal dismissed 305 N. Y. 724; *People* v. *Variano*, 5 N. Y. 2d 391.

A Federal Court Should Exercise Its Power to Grant the Injunction

There is no question about the equitable *power* of the federal courts to act with respect to the subject matter. The question is the exercise of discretion to act. Numerous are instances in which the federal courts have exercised equitable jurisdiction against state officers to sustain federal rights. Some of those cases are: *Sterling* v. *Constantin*, 287 U. S. 378; *Hague* v. *CIO*, 307 U. S. 496; *Ex parte Young*, 209 U. S. 123, 155; *Brown* v. *Board of Education*, 347 U. S. 483; *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278, 292, 293; *Truax* v. *Raich*, 239 U. S. 33, 37; *Cavanaugh* v. *Looney*, 248 U. S. 453, 456; *Terrace* v. *Thompson*, 263 U. S. 197, 214; *Dreyer* v. *Illinois*, 187 U. S. 71.

Should a federal court prevent the introduction at the State criminal trial of wiretap evidence? This is the sole question to be resolved by this Court. In this case, upon the application for a stay, Judge Medina held for the Court of Appeals that power to grant an injunction existed to prevent divulgence of wiretap evidence expected to be introduced at a State trial, and that such power should be exercised. See also, *Rea* v. *United States*, 350 U. S. 214, where a federal officer was enjoined from using wiretap evidence in a State prosecution; also *Reitmaster* v. *Reitmaster*, 162 Fed. (2) 691 (2nd C. C. A.). In *Burack* v. *Liquor Authority of New York*, 160 Fed. Supp. 161, the District Court assumed jurisdiction to grant an injunction against the use of wiretap evidence before an administrative board.

The only argument that might be urged against the exercise of equity power by a federal court is that the federal

system requires a certain indefinable restraint by federal courts to prevent the use of the illegally gained evidence from being used in a state court, though it has no such qualms in a prosecution in a federal court (*Stefanelli* v. *Minard*, 342 U. S. 117). But is this the answer? Must the federal courts back away from enforcing its own laws because in a trial at which illegal wiretaps will be introduced a state is involved. Suppose the federal government had prosecuted a state official for violating the federal law against wiretapping in this case, wouldn't this be a disrespect of "the proper balance between the states and the federal government in law enforcement"? Indeed, such prosecution at this very stage, at this very date, would be as much intrusion by the federal government as would be an injunction. Yet no one would argue that such prosecution could not lie. *Ex parte Royall*, 117 U. S. 241, 251; *Boske* v. *Comingore*, 177 U. S. 459.

But the answer given is that it would not be "orderly" for an injunction to issue to prevent evidence from being used. This is not an adequate solution however for enforcement of federal law. Suppose the victim of the intrusion learned about the intercepted messages long before a prosecution of him was contemplated. *What interference would there be with an orderly trial in the State court if no trial had yet started?* Should the federal government be prevented, therefore, at any stage from vindicating its law?

The adherence to "order" at the cost of sacrificing the dignity of federal law and federal supremacy is a fetish, that cannot be supported. "Order" is not an end in itself. The intellectual mind has a tendency to fall into that groove. The intellectual feels cozy when all is orderly. His goal is

to arrange facts into orderly generalities and to gain symmetry. But order, while desirable, is elusive. The pressures of events, the pressures of facts come along to frustrate it. Events are more stubborn than formal arrangements. Formalities, fictions at best, must give way to justice and to its proper administration. Here we have the articulate need for a remedy. Must that necessity yield for the sake of the harmony found in order?

The petitioner might have been successful in restraining the state officers in the state criminal court or at Special Term (see, *People* v. *Roth*, 207 Misc. 875; *Matter of Silfa* v. *Kennedy*, 5 Misc. (2) 375; 3 App. Div. (2d) 818; 3 N. Y. (2d) 374) in which cases, state judges acted before trial was commenced to prevent the use of evidence unlawfully seized. Those cases illustrate the fallacy that a "piecemeal" trial will result. Piecemeal activities at criminal trials take many forms, such as demurrers, motions to inspect grand jury minutes, motions for a bill of particulars, habeas corpus, etc. These are interferences with a speedy trial and are no different in principle from an application for an injunction or stay.

If such interferences with an orderly trial by state courts are acceptable, how are they less interferences when performed by federal judges sitting just across the street from the state court building? The federal judge at least, stands on firmer ground. He is seeking to enforce federal law,—paramount law; and enforcement of paramount law should take precedence over all other factors. Failure to do so, not because of lack of power, but squeamishness to exercise it, can result in only a lack of respect for the enforcement of the law.

"Interference" with the state prosecution in this case by a federal court is comparable to the minimal interference that occurs every time a challenge is made in a federal court under *Weeks* v. *United States*, 232 U. S. 383 to exclude illegally obtained evidence. Such challenges are of frequent occurrence that Rules have been established to govern them. Federal Rules of Criminal Procedure, Rule 41-e.

The diffidence a federal judge may feel toward intrusion into a state prosecution should not be dispositive of the greater issue of the supremacy of federal law. Jurisdiction to vindicate federal law resides in a federal court, and such power has claims superior to diffidence. Resentment against federal intrusion has no support in reason. Its source may be found in artificial emotional appeals. The judge who sits in a federal court is no less a human being endowed with power than the judge sitting in a state court. And often, the concatenation of events determines whether he is appointed to a federal post rather than to that of a state. Therefore, the exercise of power by a federal judge, is not to be fettered any more than is the power of a state judge to act at any pretrial stage of a prosecution,—and as was demonstrated above, state judges have acted at such stages and have not deemed their exercise of power an interference with impending prosecutions.

If the argument against interference with state trials is removed, reluctance to exercise equity power should be dissipated, for the numerous cases cited, support such power in the federal courts against state officers. And since the exercise of such power is discretionary, the im-

passe created by the dilemma in this case, should weigh heavily in favor of its exercise. A federal court should not be reluctant to vindicate the supremacy of federal law.

Respectfully submitted.

EMANUEL REDFIELD
Counsel, Amici Curiae
60 Wall Street
New York 5, New York
HA 2-1023

FILE COPY

To be argued by
WALTER E. DILLON
and
IRVING ANOLIK

Office Supreme Court, U.S.
FILED
JAN

IN THE

Supreme Court of the United States

October Term, 1960

No. 111

BURTON N. PUGACH,

Petitioner,

against

HONORABLE ISIDORE DOLLINGER, District Attorney of Bronx County, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

ISIDORE DOLLINGER,
District Attorney, County of Bronx,
Attorney for Respondents.

WALTER E. DILLON,
IRVING ANOLIK,
ALEXANDER E. SCHEER,
Assistant District Attorneys,
of Counsel.

INDEX

	PAGE
Opinions Below	1
Question Presented	1
The Complaint and Motion for a Temporary Injunction	2
The Factual Background	3
The Proceedings in the Federal Court	4
Argument	5
POINT ONE—Federal courts should not intervene in State criminal proceedings to suppress the use of evidence	5
A. No injunction should be granted. Petitioner is not threatened with irreparable injury	10
B. The temporary injunctions in the case at bar were granted upon the wholly unwarranted assumption that respondents had admitted the truth of petitioner's claim	11
POINT TWO—No constitutional issue is raised upon this appeal. The federal policy of excluding wiretap evidence is strictly a rule of evidence, not binding upon the State courts	17
POINT THREE—Section 605 does not confer any "rights" upon a defendant in a State criminal proceeding	19
A. It is doubtful that Congress contemplated or intended that Section 605 should apply to State law enforcement agencies and to thwart or frustrate police investigations	22
B. It is unnecessary and improper for the Court below to stay the use of evidence obtained as a "fruit" of wiretaps	26
POINT FOUR—Federal courts should not enjoin State criminal proceedings	28
Conclusion	31

Citations

PAGE

CASES CITED:

Benanti v. United States, 355 U. S. 96 ..... 17, 20, 23
Elkins v. United States, 364 U. S. 206 ..... 20, 21
Erie R. Co. v. Tompkins, 304 U. S. 64 7
Faqua v. United Steel Workers of America, 255 F. 2d 594 30
Goldman v. United States, 316 U. S. 129 ..... 19, 27
Goldstein v. United States, 316 U. S. 114 27
Hoag v. New Jersey, 356 U. S. 464 21
Hogan, Matter of v. Bohan, 305 N. Y. 110 16
Maguire v. Amrein, 110 F. Supp. 414 10
Martin, Matter of, 170 Misc. 919 14
Nardone v. United States, 302 U. S. 379 and 308 U. S. 338 ..... 17, 27
Olmstead v. United States, 277 U. S. 438 17
On Lee v. United States, 343 U. S. 747 20
People v. Defore, 242 N. Y. 13 19
People ex rel. Hirschberg v. Supreme Court, 296 N. Y. 392 14
People v. Saperstein, 2 N. Y. 2d 210, cert. den. 353 U. S. 946 ..... 24, 29
People v. Stemmer, 298 N. Y. 728, aff'd 336 U. S. 963 28
People v. Variano, 5 N. Y. 2d 391 24
Rathbun v. United States, 355 U. S. 107 ..... 20, 27
Rayson v. United States, 238 F. 2d 160 20
Rea v. United States, 350 U. S. 214 ..... 17, 20, 21
Reitmeister v. Reitmeister, 162 F. 2d 691 20
Schwartz v. Texas, 344 U. S. 199 ..... 17, 20, 21
State v. Gorham, 110 Wash. 330 23
Stefanelli v. Minard, 342 U. S. 117 ..... 5, 10, 29

CASES CITED (Cont'd)

PAGE

United States v. Gori, 282 F. 2d 43 13
United States v. Guller, 101 F. Supp. 176 20
United States v. Lee, 274 U. S. 559 20
Voci v. Storb, 235 F. 2d 48 29
Wolf v. Colorado, 338 U. S. 25 ..... 17, 19, 20

CONSTITUTION AND STATUTES:

N. Y. Const. Art. I, § 12 24
N. Y. Code of Criminal Procedure:
§ 813-a 24
§ 952-t 14
Radio Act of 1927, § 27 22

MISCELLANEOUS:

Rule 25(b) United States Court of Appeals, Second Circuit 13
57 Col. L. Rev. 1159 ..... 23, 27
44 Cornell L. Q. 175 26
Dash, Knowlton and Schwartz, The Eaves Droppers (1959) 25
G. Dobry, "Wire Tapping and Eavesdropping; A Comparative Survey, J. Int'l Comm'n Jurists, Vol. I, No. 2, 320 (1958) 25
46 Geo. L. J. 418 23
57 Mich. L. Rev. 37 23
Rosenzweig, Law of Wire Tapping, 32 Cornell L. Q. 514 23
S. Rep. No. 781, 73d Cong. 2d Sess. 11 [1934] 22
H. R. 23, H. R. 5305, S. 1396, 72d Cong., 1st Sess. (1931); H. R. 9893, 72d Cong., 1st Sess. (1932) 22
47 Stat. 1381 (1933) 22

IN THE

Supreme Court of the United States

October Term, 1960

No. 111

BURTON N. PUCACH,

Petitioner,

against

HONORABLE ISIDORE DOLLINGER, District Attorney of Bronx County, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

Opinions Below

The opinion of the Court of Appeals for the Second Circuit, affirming the judgment and order of the United States District Court for the Southern District of New York, dismissing the complaint and denying a temporary injunction, respectively, is reported at 277 F. 2d 739. The opinion of the District Court is reported at 180 F. Supp. 66.

Question Presented

Do the federal courts have jurisdiction to intervene in State criminal proceedings to suppress the use of evidence allegedly secured in violation of Section 605 of the Federal Communications Act?

The Complaint and Motion for a Temporary Injunction

Petitioner, Burton N. Pugach, a citizen of New York, alleged in his complaint that respondents and their agents, after securing an order from the Supreme Court of the State of New York permitting them to tap his wires, intercepted telephonic communications, thus obtaining certain information.

It is further asserted that respondents divulged the information obtained to the Grand Jury of Bronx County, as a result of which Pugach and three others were indicted for the crimes of Maiming, Burglary, Assault and Conspiracy. In another indictment, Pugach alone, was charged with a violation of Section 1897, subd. 5a, N. Y. Penal Law (Possession of a loaded gun without a written license).

Pugach further alleged upon information and belief that respondents intend to use the evidence secured from the wiretaps upon the trial of the aforementioned indictments in the County Court, Bronx County. He claimed that a conviction upon the trial at which the wiretap evidence is introduced will cause him irreparable damage such as the loss of his license to practice law and the revocation of a liquor license issued by the New York State Liquor Authority, besides subjecting him to personal punishment.

Since he assumed a disclosure by respondents of the wiretap evidence at the trial of the indictments in the County Court, Bronx County, will violate Section 605 of the Federal Communications Act, petitioner demanded the following relief:

1. That respondents and their agents be prohibited and enjoined from proceeding against petitioner upon the indictments in the County Court, Bronx County, "on any grounds in which they may use wiretapping evidence, or on any grounds or investigations resulting from or instituted as a result of the aforesaid illegal wiretaps".

2. That respondents be directed to turn over to petitioner any and all wiretaps and recordings of the petitioner.

The papers in support of petitioner's motion for a temporary stay were substantially consistent with his complaint and added nothing significant thereto.

The Factual Background

In November 1959, petitioner Pugach and three others were jointly indicted by the Grand Jury of Bronx County, State of New York, for the crimes of Maiming, Burglary, Assault and Conspiracy. The maiming count of the indictment, which is the principal charge, is predicated upon Pugach's alleged participation in the acid blinding of a young woman.

At the same time, another indictment was lodged against Pugach for a violation of Section 1897, subd. 5a, N. Y. Penal Law (Possession of a loaded gun without a written license).

The trial of the indictment for Maiming, etc., was set down for January 7, 1960. About two weeks before the trial was to begin and after extensive preparations had been made by the prosecution, petitioner brought the present action in the District Court against the Police Commissioner of the City of New York and the district attorney of Bronx County.

As a result of the instant suit and the temporary injunctions granted by the Circuit Court, the trial of the indictment for Maiming, *et cetera*, has been delayed. Thus far, the case has not been tried.

On February 24, 1960, the respondent district attorney proceeded to trial on the indictment against Pugach for the weapon violation. The jury rendered a verdict finding Pugach guilty as charged.

The Proceedings in the Federal Courts

The instant suit was brought in the District Court, Southern District of New York, on December 24, 1959. Together with the service of the complaint herein, petitioner served his papers on a motion for an injunction *pendente lite*. Respondents made a cross-motion for the dismissal of the complaint.

The motion and cross-motion came on to be heard before Judge Frederick Van Pelt Bryan, who then asked respondents to adjourn the State criminal trial to afford him ample time to consider the matter. In accordance with this request, the district attorney consented to a postponement of the trial in the County Court.

On January 13, 1960, Judge Bryan denied petitioner's application for the temporary injunctive relief and granted the cross-motion to dismiss the complaint.

An appeal from the judgment was then taken by petitioner to the United States Court of Appeals for the Second Circuit. On February 11, 1960, that Court (Medina and Waterman, J.J.—Madden, J. dissenting) granted an application made by petitioner to restrain respondents, pending the determination of the appeal, from using and disclosing wiretap evidence at the trials in the County Court, Bronx County, on the two indictments there pending against petitioner.

On April 14, 1960, the Circuit Court affirmed the judgment of the District Court and vacated the stay which had been granted on February 11, 1960.

On April 26, 1960, the Circuit Court denied a rehearing but enjoined respondents from using and disclosing wiretap evidence until May 16, 1960 and provided further that if on or before said date there is filed a certificate of the Clerk of the Supreme Court that a certiorari petition, record and briefs have been filed, the stay shall continue until the final disposition of the case by the Supreme Court.

On May 16, 1960, an *ex parte order* was granted by two Judges of the Circuit Court enlarging the time of petitioner to file the aforementioned certificate up to and including May 31, 1960. The petition was filed within the extended period.

On July 12, 1960, the Circuit Court enlarged the scope of the injunction "to include the fruits of the wiretapping as well as the intercepted messages."

ARGUMENT

POINT ONE

Federal courts should not intervene in State criminal proceedings to suppress the use of evidence.

In *Stefanelli* v. *Minard*, 342 U. S. 117, a parallel problem to the one at bar was presented for consideration. Justice Frankfurter, writing for the Court, declared (342 U. S. at pp. 120, 123):

> "We hold that the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure. The maxim that equity will not enjoin a criminal prosecution summarizes centuries of weighty experience in Anglo-American law. It is impressively reinforced when not merely the relations between coordinate courts but between coordinate political authorities are in issue."
>
> * * *
>
> "The consequences of exercising the equitable power here invoked are not the concern of a merely doctrinaire alertness to protect the proper sphere of the States in enforcing their criminal law. If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with

> review if need be to this Court, to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution."

The wisdom of this Court's opinion in *Stefanelli* v. *Minard, supra*, has been demonstrated by the interference resulting from this action encountered by the People of the State of New York in their endeavor to prosecute criminal charges against petitioner unhindered by a determination, made in advance of the trial of the indictments, suppressing the use of evidence.

Respondents respectfully submit that all rulings as to the admissibility or suppression of evidence must necessarily be made by the trial court alone, subject, of course, to review upon appeal from the judgment. There cannot be an orderly presentation of a case where such determinations are made beforehand in an abstract way.

Petitioner's only concern in the instant action has been to secure temporary injunctions in the Federal courts to prevent the speedy and effective prosecution of the criminal charges. Surprisingly enough, he has succeeded in obtaining this drastic relief upon a complaint which had been dismissed and upon a bare claim wholly unsupported by fact—a claim which he could not even hope to establish at a trial.

The present action was brought for a *permanent* injunction. This relief can be granted only after a trial of this suit in the United States District Court.

Respondents respectfully ask this Court to consider the serious consequences which would flow from the trial of this

action, brought, as it was, in the Federal court by a defendant under indictment in a State court against the State prosecutor, prior to the trial of the criminal charge in the State court.

To permit an action of this kind to be maintained would virtually be tantamount to a declaration that persons indicted for crime by a State government may, upon a bare claim of wiretapping, seek in a Federal tribunal an examination of the State prosecutor and police as to the evidence upon which the indictment was found and as to the evidence which the district attorney intends to introduce to prove the criminal charges.

Judge Lombard in the majority opinion below in referring to the consequences which would flow from these suits, said (277 F. 2d at p. 744):

> "* * * the district courts would be flooded with suits for injunctions against the use of wiretap evidence and its alleged fruits in the state courts, with the consequent necessity of determining just what evidence was proposed to be introduced and whether the trial had reached such a stage that vindication of the federal right should be subordinated to practical considerations of state law enforcement; and all these determinations would be subject to appeal, with the prosecution obstructed in the meanwhile."

It should not be difficult to imagine the effect of such actions upon State prosecutions. The result would be simply disastrous to the administration of criminal justice in New York.

In *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, this court in an opinion per Brandeis, J., said at *id.* pp. 78, 79:

> "* * * there stands, as a perpetual protest against its repetition, the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States—independence in their

> legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence."

Respondents respectfully submit that a decree of a Federal court restraining witnesses in a State criminal action from giving testimony concerning information secured from wiretaps would clearly by an invasion of the sovereign power of New York to maintain its own judicial department.

The difficulties which have arisen in respect of Section 605 stem from the attempts to compel the States to exclude wiretap evidence in conformance with the rule of evidence in the Federal courts. From time to time various theories have been advanced as a means of accomplishing this.

Petitioner now advances a new idea. He asserts that Section 605 is a civil rights statute and, as such, should be enforced by injunction (Petitioner's brief, p. 17).

One may well wonder as to reason for the struggle to find a way which will have the appearances of legal justification for diluting the reserved power of the States for the purpose of enforcing Section 605 more effectively. It would seem that the answer, or at least a clue, can be found in petitioner's brief.

In matter which has been taken from the dissenting opinion of Judge Clark in the Court below, petitioner refers to various estimates as to the extent of wiretapping in New York. Attention is also called to the fact that there "appears to have been only one successful prosecution under the statute." (Petitioner's Brief, pp. 9, 10)

If the figures given were to be accepted as true, they would indicate that, despite the alleged prevalence of wire-

tasting, Section 605 is just one conviction in more than 26 years removed from being completely impotent.

When Section 605 was enacted, Congress intended that it was to be enforced, as are all other similar laws, by the executive branch of the Federal government--not by its judiciary or by the States. Oddly enough, with the exception of the one conviction, the only effect which has been given to Section 605 has been through the Federal courts.

Since the enactment of Section 605, the executive department has never felt this legislation to be applicable to State law enforcement agencies. This is evidenced by the complete absence of any such prosecutions during the 26 years this legislation has existed. It is pure speculation as to what the state of the law might now be had the executive department otherwise interpreted the intent of Congress in enacting Section 605. Is it conceivable that vigorous federal action against state law officers, acting with other intent but to apprehend law breakers, would have continued, without Congress clarifying the intent of this legislation?

Congress has undoubtedly been aware of the administration of its statutory mandate in this field. Its failure to take any further action on the topic for more than a quarter of a century certainly suggests its approval of the interpretation by the executive department of the legislative intent.

The New York Civil Liberties Union and the American Civil Liberties Union, *amici curiae*, in their brief at page 8, assert that the injunction sought by petitioner might have been secured by him in the State courts prior to the trial of the indictments. The two lower court cases cited by them fail to sustain their contention. The inaccuracy of their argument is demonstrated by the most recent pronouncements of the highest court of the State of New York, cited by them at page 5 of their brief, as holding that the manner in which evidence is procured does not affect its admissibility.

A.

No Injunction Should Be Granted. Petitioner Is Not Threatened With Irreparable Injury.

In his complaint, Pugach alleged that if the respondents violated Section 605 by introducing evidence of intercepted telephonic communications at the State criminal prosecutions and he is convicted, he will suffer irreparable injury in that he will be deprived of his liquor license and the license to practice law.

The indictments against Pugach in Bronx County are predicated upon his alleged participation in the acid blinding of a young woman and upon his carrying a loaded firearm concealed on his person. His right to practice law or his right to the liquor license will not be adjudicated upon a trial of those indictments. The loss of these property rights might result from the conviction for either of the crimes charged—not because any evidence at the trial of the criminal charges violated Section 605.

With respect to the question of irreparable injury in the *Stefanelli* case, which is equally applicable to the instant proceeding, this Court declared (342 U. S. at p. 122):

> "No such irreparable injury, clear and imminent, is threatened here. At worst, the evidence sought to be suppressed may provide the basis for conviction of the petitioners in the New Jersey courts. Such a conviction, we have held, would not deprive them of due process of law. Wolf v. Colorado, supra."

Since a violation of Section 605 was made a crime under Section 501, petitioner's demand for an injunction to restrain respondents from committing the crime is contrary to the well established principle that equity does not enjoin the commission of a crime. (*Maguire v. Amrein*, 101 F. Supp. 414, 420, 421.)

An interesting example which demonstrates the absurdity of enjoining the commission of crime would be an action

for an injunction to restrain a defendant from carrying out his threat and plan to murder the plaintiff. There could be no doubt that such crime, if committed, would produce irreparable injury. However, it is equally certain that if the death penalty for murder would not deter the defendant, it could hardly be expected that an injunction decree would do so. Indeed, it is reasonable to assume that one who intended to commit a crime punishable by death, would consent to an injunction so that he might first be punished for contempt of court before suffering the supreme penalty.

The only effect which a court decree could have in enjoining the commission of a crime would be to increase the punishment prescribed by statute for the crime. Whether punishment for a crime should be made greater involves a problem for the legislative branch of the government.

B.

The Temporary Injunctions in the Case at Bar Were Granted Upon the Wholly Unwarranted Assumption That Respondents Had Admitted the Truth of Petitioner's Claim.

Petitioner tells this Court that it is not disputed that respondents tapped petitioner's telephone and divulged the information thus obtained to the Grand Jury and that the district attorney does not deny that he intends to use such evidence at the trials of the two indictments (Petitioner's Brief, p. 4).

It is to be noted that petitioner does not point to a single fact in his complaint or in his papers for the temporary injunction which supports his claim that wiretap conversations were divulged to the Grand Jury or that the district attorney intends to introduce this evidence at the State trials. Petitioner merely says that Judge Medina and Judge Lumbard in stating the facts in their

opinions assumed that respondents were admitting the truth of petitioner's claim (Petitioner's Brief, p. 4).*

To assert that respondents have not denied petitioner's claim is grossly unfair. Petitioner knows full well that when he served his complaint and his papers on the motion in the District Court for a temporary injunction, the respondents cross-moved to dismiss the complaint on the ground that the action was not maintainable. The cross-motion was granted. Consequently, there was no need whatsoever to take issue with the allegations of a complaint which was legally insufficient.

An appeal was taken by petitioner from the judgment of the District Court dismissing the complaint and the order denying the injunction *pendente lite*. Petitioner then applied to the Court of Appeals for the injunctive relief pending appeal. At this point there was no action pending, the complaint having been dismissed. Again, respondents relied upon the fact that the suit was not maintainable.

In granting the injunction, the Court of Appeals in an opinion by Medina, J., stated that petitioner had a "powerful" case because the respondents had not denied the allegations of the complaint.

After hearing the appeal, the Court of Appeals affirmed the order and judgment of the District Court and vacated the "stay". An application was then made by petitioner for a rehearing or in the alternative for a "stay" pending the determination of a petition to this Court for certiorari.

The application for the rehearing was based solely on the record, as the rules of the Court of Appeals provide.

---

* The facts stated on page 6 of the brief of the Attorney General of the State of New York, *amicus curiae*, were apparently taken from petitioner's brief or the opinions of the United States Court of Appeals. The Attorney General has not participated in any way in the State prosecutions of Pugach and consequently has no knowledge of the facts.

(Rule 25(b), United States Court of Appeals, Second Circuit; *United States* v. *Giori*, 282 F. 2d 43.) The rehearing was denied but a "stay" pending the determination of the present appeal was granted.

The next step taken by petitioner was a motion addressed to the Court of Appeals to enlarge the scope of the existing injunction. Respondents in opposing this motion asserted that the injunction which was sought to be broadened should not have been granted in the first place because petitioner's claim was without factual support.

A deaf ear was turned to respondents' plea. The Court granted the motion to enlarge the injunction, holding in an opinion by Friendly, J. (280 F. 2d 521) that it was "too late" for the district attorney to tell the Court that they had been granting the injunctions without basis in fact.

The responsibility for granting the unwarranted injunctions cannot be shifted to the district attorney by merely stating that he should have called the Court's attention earlier to the lack of proof. Had the district attorney the slightest idea that the Court of Appeals intended to grant this unprecedented relief, the respondents' contention assuredly would have been made known.

In any event it could properly be assumed that the Court would carefully examine the record. The temporary injunctions could only have been decreed upon the showing made by petitioner in his papers.

In his complaint and in his moving affidavit for the temporary injunction, petitioner made the following unsupported claims: (1) that respondents intercepted telephonic communications by tapping his telephone wires and divulged the information to the Grand Jury of Bronx County, as a result of which two indictments were lodged against him and (2) that he *believes* that respondents intend to use the evidence upon the trial of the indictments.

With respect to the allegation concerning the Grand Jury evidence, it was patent that this claim had been predicated purely upon conjecture. Petitioner did not assert that he had ever inspected the grand jury minutes and, therefore, could not have had any knowledge as to the evidence upon which the indictments were found. It is the policy of law that grand jury proceedings be held secret and that the minutes thereof be not revealed without an order of the trial court. (Section 952-t, Code of Criminal Procedure of the State of New York; *Matter of Martin*, 170 Misc. 919; *People ex rel. Hirschberg* v. *Supreme Court*, 269 N. Y. 392.) Parenthetically, it may be said that the respondents would find themselves in a dilemma in pleading to this allegation of the complaint.

The allegation that petitioner *believes* that respondents intend to use wiretap evidence at the trial of the indictments is just a bare claim which was entitled to no consideration. How can anyone challenge what petitioner believes unless the petitioner sets forth the facts upon which that belief is grounded?

The temporary injunctions decreed by the Court of Appeals restrained respondents from introducing wiretap evidence at the trials of the two aforementioned indictments in the County Court, Bronx County. While thus restrained, the respondent district attorney proceeded with the trial of the indictment which charged petitioner with the crime of carrying concealed on his person a loaded firearm in violation of Section 1897, Penal Law of the State of New York. The jury rendered a verdict of guilty.

A brief resume of the evidence adduced at the State trial as to the manner in which the police secured their information, will demonstrate how frank the petitioner has been in the present action and how wrong the Court of Appeals was in granting the injunctions without a factual basis.

After the police had concluded their investigation into the acid blinding of one Linda Riss, detectives were assigned to arrest petitioner. These detectives apprehended Pugach at about 10:30 A.M. on October 30, 1959, in the lobby of the building where petitioner had his law office. Pugach was carrying his briefcase, and was about to enter an elevator on his way to work, when he was stopped by these officers.

Petitioner was not subjected to any public embarrassment in the lobby but was merely asked to accompany the officers. He walked with the detectives out of the building and across the street, which is one of the widest and most heavily travelled thoroughfares in the County, to the automobile of the officers.

After Pugach was seated in the car, one of the detectives, following police department routine, decided to frisk petitioner. As the officer started to do this, he asked petitioner to open his coat. Pugach, who had his briefcase on his lap, placed it on the floor and unbuttoned his coat.

When the frisking was completed Pugach picked up the briefcase and again rested it on his lap. One of the detectives seated alongside of petitioner then took the briefcase and placed it on the floor between his own feet. As he did so, the detective pulled back the zipper on the briefcase and discovered therein a gun loaded with five live bullets.

The police whose only concern at the time was the acid blinding case, had no more reason to expect that Pugach had a loaded firearm than this Court would have for believing that any particular attorney who steps up to argue an appeal has a loaded gun in his briefcase.

Had the detectives wiretap information, as petitioner claims, or the slightest inkling from any source that Pugach was carrying a loaded gun, it is inconceivable that the police officers would have placed their lives in jeopardy by permitting a prisoner to have a lethal weapon.

The foregoing account of the evidence on the indictment was in no way challenged at the State trial. The circumstances as to how this evidence was discovered was necessarily as well known to Pugach as it was to the respondents.

Petitioner not only deceived the Court below in securing the injunction, he likewise attempted to use that decree to deceive the County Court. Among other things, he moved in the County Court to set aside the above mentioned verdict of guilty on the weapon charge, asserting that the Court had violated the injunction by denying an application by petitioner for a discovery of the State's evidence in advance of the trial.

Of course, the injunction placed no restraint on the County Court. However, the County Court, having no knowledge as to the proceedings in the Federal courts, apparently has been intimidated to the extent that since March 3, 1960, the date of the verdict of guilty, the sentence was postponed on petitioner's insistence until November 9, 1960, a date which petitioner himself finally requested for the pronouncement of the judgment on the verdict. New York law requires that sentences be imposed without delay (*Matter of Hagan* v. *Bohan*, 305 N. Y. 110).

The evidence which respondent district attorney intends to introduce at the trial of the indictment against petitioner and his three confederates for the crimes of Maiming, et cetera, has not been revealed. It is significant, however, that despite the existence of the temporary injunctions the district attorney has constantly endeavored to proceed with the trial of this indictment. Were it not for the interference resulting from the instant suit, the trial would have proceeded on January 7, 1960.

POINT TWO

No constitutional issue is raised upon this appeal. The federal policy of excluding wiretap evidence is strictly a rule of evidence not binding upon the State courts.

On a number of occasions this Court and lower Federal courts have had the opportunity to interpret Section 605 of the Federal Communications Act (47 U. S. C. § 605). There has apparently been no holding in any of these instances that a violation of this statute presents a constitutional issue. As a matter of fact this Court has scrupulously avoided predicating any of its decisions in this field upon constitutional grounds. This is equally true of the parallel problems posed in the unlawful search and seizure cases. It is abundantly clear, from the opinions of this tribunal and other federal forums, that wiretap evidence in federal trials is excluded by virtue of a rule promulgated under the supervisory capacity this Court exercises over federal agencies and courts.

Benanti v. *United States*, 355 U. S. 96;
Nardone v. *United States*, 302 U. S. 379, and 308 U. S. 338;
Schwartz v. *Texas*, 344 U. S. 199;
People v. *Variano*, 5 N. Y. 2d 391;
Cf. *Wolf* v. *Colorado*, 338 U. S. 25;
Rea v. *United States*, 350 U. S. 214.

Even before Section 605 was enacted into law, this Court had already proclaimed that neither the Fourth nor Fifth Amendments to the United States Constitution were violated by the tapping of telephones (*Olmstead* v. *United States*, 277 U. S. 438).

It is significant at this juncture to call the Court's attention to the fact that the respondents have never attempted to introduce wiretap evidence, directly or indirectly, upon either of the two indictments handed up against

petitioner by the Bronx County Grand Jury. One of these indictments, namely, that charging Pugach with the felonious possession of a loaded gun, has already been tried, and a conviction has been obtained. The petitioner, in that case, was found with a loaded revolver in his physical possession and obviously no wiretap evidence was needed and none was used.

The respondents have neither denied nor admitted that wiretap testimony was adduced before the Grand Jury. This does not stem from any lack of candor or equivocation, but rather from the fact that it would be improper for the District Attorney to divulge anything that transpired before the Grand Jury without an order of a Court of competent jurisdiction. The petitioner has admittedly never seen a transcription of the Grand Jury minutes upon either of the indictments. Notwithstanding these facts, the Court below has assumed that wiretap evidence exists. The District Attorney has conceded, *arguendo*, that such evidence is extant. In this Court too, the respondents will concede, for the sake of argument only, that wiretap evidence has been obtained which relates to the petitioner herein.

There has been no declaration or concession, however, on the part of the District Attorney, that wiretap evidence will be used upon the remaining indictment, namely, that charging petitioner with the acid-blinding of a young woman.

The position of respondents is that they will use whatever evidence the interests of justice require provided it may lawfully be adduced in the Courts of the State of New York.

Upon the argument in the Court below the petitioner conceded that the alleged wiretaps were obtained in accordance with the statutory procedures of the State of New York and under a proper warrant of a Court of competent jurisdiction. It is, therefore, submitted that there

is serious question as to whether a Fourth Amendment issue can conceivably be raised by petitioner.

In any event, in parallel situations concerning unlawful searches and seizures, this Court has clearly decided that it will not disturb a conviction of a State Court predicated upon unlawfully seized evidence where the rules in that State permit the admission of such matter (See, *Wolf* v. *Colorado, supra; People* v. *Defore*, 242 N. Y. 13, 21).

POINT THREE

Section 605 does not confer any "rights" upon a defendant in a State criminal proceeding.

Both in the Court below and in his brief upon this appeal, petitioner has insisted that Section 605 has conferred certain "rights" upon him. One of these "rights", Pugach contends, is that no State shall use wiretap evidence, or the fruits thereof, against him in a State criminal proceeding. It is difficult to determine upon what foundation petitioner rests this premise.

In *Goldman* v. *United States*, 316 U. S. 129, this Court, analyzing Section 605, declared (316 U. S. at p. 133):

> *"The protection intended and afforded by the statute is the means of communication and not of the secrecy of the conversation."* (Italics ours.)

If the "right" to which petitioner alludes is one of secrecy, then it would seem that Section 605 is improperly invoked. That statute clearly does not confer any such "right" upon Pugach. The aim of the statute is to protect a means of communication and not to bestow any rights or privileges upon defendants in State criminal actions.

Section 605 is not an anti-eavesdropping law. The statute is clearly limited to situations where electronic devices, actually in contact with the telephone system, are employed. Thus, in *Goldman* v. *United States, supra*, a

listening device attached to the wall was not deemed an interception. Similarly, the use of a small portable transmitter for the purpose of transmitting a conversation with a suspect to officers holding a receiver, is not objectionable so long as defendant's property is not trespassed upon (*On Lee* v. *United States*, 343 U. S. 747). The same thing holds true for long-range observation by searchlights, binoculars or cameras (*United States* v. *Lee*, 274 U. S. 559).

In lower Courts, the Ninth Circuit has declared that listening from an adjoining room by an electronic device was not violative of the statute (*Rayson* v. *United States*, 238 F. 2d 160).

See, too:

United States v. *Guller*, 101 F. Supp. 176;
Reitmeister v. *Reitmeister* (2nd Cir.), 162 F. 2d 691, 694.

In the recent case of *Rathbun* v. *United States*, 355 U. S. 107, this Court declared that listening or recording from one end of a telephone line, at least with the authorization of one of the parties to the conversation, is not contrary to the provisions of Section 605.

This Court, acting under its supervisory powers over the administration of justice in Federal Courts, promulgated a rule of evidence which now precludes wiretap testimony in any federal trial. In every case that respondents could find on the subject, this Court has scrupulously avoided any declaration which would indicate that it was attempting to foist a similar rule of evidence upon the State Courts.

Schwartz v. *Texas*, *supra*;
Benanti v. *United States*, *supra*;

Cf:

Rea v. *United States*, *supra*;
Wolf v. *Colorado*, *supra*;
Elkins v. *United States*, 364 U. S. 206.

In *Schwartz* v. *Texas*, *supra*, it was clearly held that a conviction obtained in a State Court by the use of wire-tap evidence would not be disturbed upon appeal to the federal tribunals where the State's rules of evidence permitted the use of such matter.

The *Benanti* decision, *supra*, specifically indicated that *Schwartz* v. *Texas* was not being overruled since this Court took pains to observe that *Schwartz* v. *Texas* was "not to the contrary" (355 U. S. at p. 106, n. 19).

In parallel situations involving unlawful searches and seizures, this Court has made special efforts to distinguish between the federal rules of evidence and those of the several States. Thus, in *Rea* v. *United States*, *supra*, this Court, while enjoining federal officers from testifying in a State Court with respect to evidence obtained after an illegal search and seizure, nevertheless specifically observed that it was acting under its supervisory powers over federal agencies and was not attempting to enjoin State officials or a State prosecution.

Recently, in *Elkins* v. *United States*, *supra*, this Court again pointedly noted that it was not attempting to lay down rules of evidence applicable to any Courts other than federal. The Court declared (*Elkins* v. *United States*, *supra*, 364 U. S. at p. 216):

> "What is here invoked is the Court's supervisory power over the administration of criminal justice in the federal courts, under which the Court has 'from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions.' *McNabb* v. *United States*, 318 U. S. 332, 341."

These cases are consistent with the policy re-enunciated by the Supreme Court in *Hoag* v. *New Jersey*, 356 U. S. 464, 468:

> "For it has long been recognized as the very essence of our federalism that the States should have the widest latitude in the administration of their own

systems of criminal justice. See, *Hurtado* v. *California*, 110 U. S. 516; *Maxwell* v. *Dow*, 176 U. S. 581; *West* v. *Louisiana*, 194 U. S. 258; *Twining* v. *New Jersey*, 211 U. S. 78."

In the light of all these decisions and the plain wording of the statute itself, it is manifest that Congress did not endow Pugach, or any other defendant in a State criminal proceeding, with any right of privacy or secrecy with respect to telephonic communications. The policy of the statute is obviously aimed at protecting a means of communication and not at thwarting the enforcement of State criminal laws.

A.

It is Doubtful That Congress Contemplated or Intended That Section 605 Should Apply to State Law Enforcement Agencies and to Thwart or Frustrate Police Investigations.

The Communications Act of 1934 was designed to bring wire and radio communications under the control of a central agency—the Federal Communications Commission. Section 605 appears to be an almost verbatim repetition of the language employed in Section 27 of the Radio Act of 1927 (44 Stat. 1172). The Committee report merely states, with reference to Section 605, that it "is based upon section 27 of the Radio Act and extends it to wire communications" (S. Rep. No. 781, 73d Cong. 2d Sess. 11 [1934]).

As a matter of fact, three years before the enactment of Section 605, Congress failed to pass several bills which forbade wiretapping and excluded such evidence from Federal Courts.

H. R. 23, H. R. 5305, S. 1396, 72d Cong., 1st Sess. (1931);
H. R. 9893, 72d Cong., 1st Sess. (1932);
Cf: 47 Stat. 1381 (1933).

In 1934 Congress passed the Federal Communications Act which includes the section here in issue. It does not

seem likely that Congress would have enacted a bill affecting so controversial a subject without any comment at all, particularly after having rejected several bills forbidding wiretapping and excluding such evidence from use in the Federal Courts, only a year or two earlier. It is therefore, logical to infer that Congress never intended to preclude wiretapping by law enforcement agencies or to interdict the use of such evidence in Court.

The thrust of the statute appears to require application of this prohibition to private wiretapping. In view of the established canon that a general statute need not be construed to bind the Government, it would seem to have been unnecessary to apply the section to governmental wiretapping.

Rosenzweig, *Law of Wire Tapping*, 32 Cornell L. Q. 514, 536;
57 Col. L. Rev. 1159, 1162;
57 Mich. L. Rev. 37, 43;
46 Geo. L. J. 418, 419.

There have been decisions excluding governmental agencies from the prohibitions of a general statute.

e.g. *State* v. *Gorham*, 110 Wash. 330, 188 Pac. 457.

In the *Benanti* case, *supra*, this Court apparently decided that Section 605 included State agents within the purview of its prohibitions. Respondents believe that this point was not actually argued in the *Benanti* case, and, therefore, there is no clear holding to this effect.

In view of the historical development of this section, it is paradoxical that this Court should have determined that State law enforcement agents, acting pursuant to a lawful warrant of a Court, should be prohibited from using such evidence. Such a rule does not enhance the legislative purpose. As a matter of fact the Constitution and laws

of the State of New York are far broader than the federal provision here involved. New York State not only forbids unauthorized wiretapping, but extends this to eaves-dropping generally.

N. Y. Const. art. I, § 12 (1939);
N. Y. Code Crim. Pro. § 813-a;
People v. *Variano*, 5 N. Y. 2d 391;
People v. *Saperstein*, 2 N. Y. 2d 210, cert. denied, 353 U. S. 946.

Moreover, while a violation of Section 605 is a misdemeanor, a violation of the New York laws constitutes a felony in most instances.

There is no doubt that violations of Section 605 and of the New York State laws have been committed and will be committed in the future by private agencies and persons. The policy of New York and of the Federal Communications Act is to prevent interference with telephonic communications.

What the petitioner is actually asking this Court to do is to void a section of the New York Constitution and the statutes enacted pursuant thereto. While Pugach engages in the casuistry of contending that there is no endeavor on his part to have the trial itself thwarted, but that only a suppression of wiretap evidence is sought, it is obvious that petitioner's ultimate aim is to completely frustrate the prosecution of this indictment. If wiretap testimony (or the fruits of wiretaps) should become essential to the establishment of Pugach's guilt, a federal injunction preventing the use of such evidence would, in effect, hobble a successful prosecution of this most heinous crime.

The Court below suggested that there was no prohibition against a trial of the acid-blinding indictment. Such a trial, however, cannot, in good conscience, be prosecuted until this Court has been given an opportunity to resolve the issues involved.

There has been a good deal of speculation as to the extent of wiretapping carried on in this country and particularly in the City of New York. In the April 1960 edition of the Minnesota Law Review there are several articles which highlight the divergence of opinion on this subject. There is clearly a very sharp disagreement as to how extensive wiretapping is.

In a recent book, *The Eavesdroppers*, by Dash, Knowlton and Schwartz (1959), the authors suggest that wiretap is carried on extensively. The authors, themselves, admit that there is no way of gauging the volume of wiretapping that is actually done (Dash, etc., *supra*, p. 68):

> "How much wiretapping is done this way by plainclothesmen is, of course, *a matter of speculation*. Accuracy of the figures, however, is not really essential * * *." (Emphasis added.)

The New York Joint Legislative Committee To Study Illegal Interception Of Communications (The Savarese Committee) determined that only 2392 wiretap orders were obtained throughout the entire State between 1950 and 1955. Dash and his colleagues, however, while citing these figures, inaccurately attribute them to a poll conducted by District Attorney Edward Silver of Kings County (The Eavesdroppers, *supra*, pp. 42, 97-104; 44 Minn. L. Rev. 835, 838).

The United Kingdom, which is not generally associated in the minds of men with the utilization of harsh or arbitrary police procedure, permits wiretapping by police officers under authority of special warrants. Subject to certain safeguards and restrictions, the nations of Denmark, Norway, Sweden, Switzerland, Italy, West Germany, Austria and France, permit wiretapping.

See:

G. Dobry, "Wiretapping and Eavesdropping: A Comparative Survey", J. Int'l Comm'n Jurists, Vol. I, No. 2, 320. (1958).

Former Attorney General Herbert P. Brownell, as well as Presidents Franklin D. Roosevelt and Harry S. Truman and others, have approved wiretapping under proper safeguards (44 Cornell L. Q. 175, 183).

There are widespread misconceptions as to the frequency of police wiretaps. In an article in 44 Cornell L. Q. 175, the authors declare (*id.* at p. 183):

> "There is, furthermore, a widespread misconception as to the frequency of police wiretaps. In a recent book Mr. Justice Douglas of the United States Supreme Court asserted that in 1952 at least 58,000 wiretap orders had been issued in New York City alone. Actually, in that year, all five district attorneys and the police department in New York procured a combined total of only 480 orders! In the United Kingdom, where wiretapping is employed in criminal cases where warrants are issued, the number of such warrants averaged slightly under 200 per year from 1952 through 1956, and never exceeded 241 in any one year."

It is, of course, impossible to determine how many unauthorized wiretaps are made by private individuals acting illegally. This, however, is a situation with which both the State of New York and the federal government are concerned. New York's laws, therefore, are in harmony with the spirit and policy of Section 605 of the Federal Communications Act in prohibiting unlawful interference with telephonic communications. In New York, of course, the statute is much broader.

B.

It Was Unnecessary and Improper for the Court Below to Stay the Use of Evidence Obtained as a "Fruit" of Wiretaps.

The Court below on July 12, 1960, enlarged the scope of the stay to include the "fruits of wiretaps" as well as wiretaps themselves. Why this should have been done is difficult to understand, unless the Court completely misin-

terpreted both Section 605 of the Federal Communications Act and the prior decisions of this Court. Incidentally, Judges Medina and Waterman in February, 1960, had refused to enlarge the scope of the temporary stay to include the fruits of wiretapping. This fact did not bother the Circuit Court in the least although it was specifically called to its attention.

The policy of Section 605 is to prevent an interference with telephonic communications. The *divulgence* of the communication would seem to be what is forbidden. If absolute secrecy were the object, then the cases which permit tapping with the consent of one of the parties to the conversation (*Rathbun* v. *United States, supra*) and the use of wiretaps against parties not participating in the conversation (*Goldstein* v. *United States*, 316 U. S. 114), would seem to be inconsistent. Obviously secrecy is not the aim of the statute (*Goldman* v. *United States, supra*).

The extension of the thrust of the federal rule to include the fruits of wiretaps, was a matter within the discretion of this Court in its supervisory capacity over the trial of matters in federal tribunals (See, *Nardone* v. *United States*, 308 U. S. 338). To extend the statute's scope, however, to the fruits of wiretaps with respect to State agents would seem to be an unwarranted intrusion upon State rules of procedure and out of harmony with the Congressional intent in enacting Section 605 (Cf: 57 Col. L. Rev. 1159, 1163).

The only purpose of extending Section 605 to include the fruits of wiretaps in the Federal Courts, was to properly enforce the exclusionary rule of evidence created by this Court. No similar rule of evidence exists in the State of New York. It is, therefore, difficult to conceive how any person can violate this statute unless they actually divulged the wiretap conversation itself. The Court below adverted to the second *Nardone* case (308 U. S. 338) as authority for enlarging the scope of the stay. In doing so,

however, that Court completely overlooked the fact that the *Nardone* case was limited to Federal Courts only. This enlargement, however, rendered it even more difficult to commence the trial on the acid-blinding indictment.

It is of extreme significance that petitioner has not demonstrated that wiretap evidence will in fact be used at his impending trial. He suggests that divulgences were made to the Grand Jury, but readily admits that he has never seen the Grand Jury minutes. Perhaps Pugach is endowed with certain occult or prescient powers which enable him to prognosticate what will occur at some future trial. Upon such flimsy conjecture, however, it is submitted that this Court and the Federal Courts generally ought not to interfere with and thwart the effective prosecution of crime in State Courts. For all petitioner and this Court know, the alleged wiretaps may have been obtained with the consent of one of the parties thereto. It would be necessary, however, for the Federal Courts to hold a hearing and perhaps a full trial on an injunction action whenever an allegation is made that wiretap evidence may be introduced.

POINT FOUR

Federal courts should not enjoin State criminal proceedings.

There is authority in this Court for the proposition that wiretapping, pursuant to the New York State statutory procedures, does not violate Section 605 of the Federal Communications Act. In *People* v. *Stemmer*, 298 N. Y. 728, the New York Court of Appeals affirmed a judgment of conviction obtained by using wiretaps, without opinion, but with the following decision (298 N. Y. at p. 729):

> "Judgment affirmed. Upon this appeal the following question was presented ..... necessarily

passed upon: The appellants contended that the receipt in evidence of wire tapped telephone calls was illegal because of section 605 of the Federal Communications Act of 1934 (U. S. Code, tit. 47, § 605). This court held to the contrary. (See *Matter of Harlem Check Cashing Corp.* v. *Bell*, 296 N. Y. 15.) No opinion."

This Court affirmed this case in 336 U. S. 963 by a divided Court.

This case is in line with the position taken by respondents under Point Three-A, *supra*.

Cf.: *People* v. *Saperstein*, *supra*.

To urge, as has the Court below, that the prosecution itself is not being enjoined is a "Pickwickian" distinction. As noted above, if wiretap evidence became essential, the prosecution itself would fail. In *Voci* v. *Storb*, 235 F. 2d 48, the Third Circuit denied injunctive relief relying upon this Court's decision in *Stefanelli* v. *Minard*, 184 F. 2d 575, aff'd 342 U. S. 117. In *Voci* v. *Storb*, *supra*, the Court declared (235 F. 2d at pp. 48, 49):

> "It will be noted that both prayers for relief are directed to the use of the alleged information or testimony gained by wire tapping in court proceedings against the plaintiff. He says that his rights are given by the Federal Communications Act, § 605, 47 U. S. C. A. § 605.
>
> We are unable to see any distinction between the problem of the propriety of federal intervention at this stage presented in this case and that in Stefanelli v. Minard, 3 Cir., 1950, 184 F. 2d 575, affirmed with the opinion by Mr. Justice Frankfurter in 1951, 342 U. S. 117, 72 S. Ct. 118, 96 L. Ed. 138."

The dissent in the Court below attempted to equate the present problem with that presented in the school segregation cases. It does not seem conceivable that such a parallel can be drawn. This Court must distinguish between promis-

cuous use of wiretaps by private agencies and authorized wiretap under constitutional and statutory fiat. The respondents do not for a moment attempt to condone the use of "illegal" wiretapping under private auspices.

It is a fundamental precept that equity will not ordinarily enjoin a criminal prosecution. It has already been demonstrated, *supra*, that the alleged *irreparable injury* does not emanate from the threat that wiretap evidence may be used at an impending trial in the Bronx County Court. Pugach has been convicted of a felony which was clearly not dependent upon the use of wiretap or the fruits thereof. To argue now that his property rights may be affected by another conviction is ridiculous. Any further conviction for another felony which may result from the impending trial for acid-blinding, would merely have an accumulative effect since the damage has already been accomplished by the guilty verdict on the gun indictment.

Judge Potter Stewart (now a Justice of the Supreme Court) summarizes the policy arguments against the Federal Courts granting such injunctive relief in the case of *Faqua* v. *United Steel Workers of America*, 253 F. 2d 594, 597, 598:

> "* * * federal courts of equity should conform to clearly defined Congressional policy, '* * * by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent. * * *'
>
> "It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. * * * Where the threatened prosecution is by state officers for alleged violations of a state law, the state courts are the final arbiters of its meaning and application, subject only to review by the [the Supreme] Court on federal grounds appropriately asserted. Hence the arrest by the federal

courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, are to be supported only on a showing of danger of irreparable injury both great and immediate.'" 319 U. S. at pages 163-164, 63 S. Ct. at page 881.

"These standards were restated in Stefanelli v. Minard, 1951, 342 U. S. 117, 72 S. Ct. 118, 96 L. Ed. 138. There the context was a different one, but the controlling policy identical."

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

ISIDORE DOLLINGER,
District Attorney, County of Bronx,
Attorney for Respondents.

WALTER E. DILLON,
IRVING ANOLIK,
ALEXANDER E. SCHEER,
Assistant District Attorneys,
of Counsel.

[redacted]ILE COPY

Office Supreme Court, U.S.
FILED
DEC 8 19[illegible]
JAMES R. BROWNING, Clerk

No. 111

IN THE

Supreme Court of the United States

October Term, 1960

BURTON N. PUGACH,

Petitioner,

—vs.—

HONORABLE ISIDORE DOLLINGER, District Attorney of Bronx County, and HONORABLE STEPHEN P. KENNEDY, Police Commissioner of the City of New York,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE*

THE DISTRICT ATTORNEYS' ASSOCIATION OF THE STATE OF NEW YORK

EDWARD S. SILVER,
District Attorney, Kings County,
Municipal Building,
Brooklyn, New York,
Attorney for Amicus Curiae,

AARON NUSSBAUM,
Assistant District Attorney,
Kings County, New York,
Of Counsel.

Case Press Inc., 82 Beekman St., N. Y.—BEekman 3-2005

TABLE OF CONTENTS

	PAGE
Interest of the Amicus Curiae	1
Summary of Argument	2
ARGUMENT—	
POINT FIRST—*Benanti* v. *United States*, 355 U. S. 96, upon which petitioner relies, is in irreconcilable conflict with the Court's controlling precedent in *Stemmer* v. *People of the State of New York*, 336 U. S. 963, re-hearing denied, 337 U. S. 921	3
A. The *Benanti* case was incorrectly decided	3
B. The *Stemmer* case is a controlling judicial precedent	6
C. *Schwartz* v. *Texas* is wholly inapplicable to the case at bar	10
POINT SECOND—The *Benanti* decision, upon which petitioner wholly relies, should be reconsidered	12
POINT THIRD—New York State's statute for telephone interception by law enforcement officers, under safeguards consistent with a reasonable search and seizure, does not contradict the letter or policy of Section 605 of the Federal Communications Act	16
A. The New York Statute is implementive of Section 605 and the Interstate Commerce clause	16
B. Unless so construed, Section 605 would be unconstitutional and void as an unreasonable exercise of the power of Congress to regulate interstate commerce	18

PAGE

C. An interception within the framework of a reasonable search and seizure does not militate against the policy considerations motivating Section 605 19

D. Authorization of the sender is not required under a New York State court-ordered interception 22

POINT FOURTH—A construction that Section 605 applies to telephone interceptions under New York Law (*Article 1, Section 12, New York State Constitution: Section 813 - New York Code of Criminal Procedure*) would be clearly unconstitutional and violative of the states' reserved police powers under the Tenth Amendment of the Constitution of the United States 26

CONCLUSION 36

AUTHORITIES CITED

Cases

Alexander v. United States, 138 U. S. 353 24
Atchison Ry. v. Railroad Comm., 283 U. S. 380 6

Benanti v. United States, 244 F. 2d 389 3
Benanti v. United States, 355 U. S. 96 .....2, 6, 11
Brooks v. United States, 267 U. S. 432 17

Caminetti v. United States, 242 U. S. 470 21
Clark v. United States, 289 U. S. 1 ..... 22, 24
Clason v. State of Indiana, 306 U. S. 439 27
Cloverleaf Butter Co. v. Patterson, 315 U. S. 148 ... 27

Durant v. Storrow, 101 U. S. 555 7

Federal Radio Comm. v. Nelson Brs. B. & M. Co., 289 U. S. 266 17

PAGE

Georgia v. Evans, 316 U. S. 159 32
Gilman v. City of Philadelphia, 70 U. S. 713 22
Goldman v. United States, 316 U. S. 129 ..... 17, 23
Goldstein v. United States, 316 U. S. 114 .....11, 14, 23

Hadachek v. Sebastian, 239 U. S. 394 26
Hamilton v. Kentucky Distilleries & W. Co., 251 U. S. 146 19
Harlem Check Cashing Corp. v. Bell, 296 N. Y. 15, 68 N. E. 2d 854 .....4, 5, 6, 7, 10
Hertz v. Woodman, 218 U. S. 205 7

International Union U. A. W. A. F. of L. v. Wisconsin Employment Labor Relations Board, 336 U. S. 245 26

Jones v. Portland, 245 U. S. 217 26

Leon v. State, 180 Md. 279, 23 A 2d 706 10

Matter of Jackson, 96 U. S. 727 22
Maurer v. Hamilton, 309 U. S. 598 27
Mobile County v. Kimball, 102 U. S. 691 17

Nardone v. United States, 302 U. S. 379 .....12, 21, 29
Nardone v. United States, 308 U. S. 338 12
Nashville, C. & L. R. Co. v. Walters, 294 U. S. 405 .. 26
Neal v. Maryland, 316 U. S. 680 8

Ohio v. Helvering, 292 U. S. 360 31
Olmstead v. United States, 277 U. S. 438 .....12, 13, 14, 23
On Lee v. United States, 343 U. S. 747 25

Penn Dairies v. Milk Control Commission, 318 U. S. 261 27
People v. Broady, 5 N. Y. 2d 500, 6 N. Y. 2d 814, 158 N. E. 2d 817, 159 N. E. 2d 690, cert. den. 361 U. S. 8 9
People v. Channell, 107 Cal. App. 2d 192, 236 P 2d 654 10
People v. Dinan, 1959, 6 N. Y. 2d 715, 158 N. E. 2d 501, cert. den. 361 U. S. 839 10

PAGE

People v. Farmer, 194 N. Y. 251, 87 N. E. 457 24
People v. Feld, 305 N. Y. 312, 113 N. E. 2d 440 4
People v. Graziano, 4 N. Y. 2d 881, 150 N. E. 2d 768, cert. den. 358 U. S. 851 9
People v. Saperstein, 2 N. Y. 2d 210, 140 N. E. 2d 252, cert. den. 353 U. S. 946 ..... 4, 6
People v. Stemmer, 298 N. Y. 728, 83 N. E. 2d 141 ....4, 7, 10
People v. Tieri, 300 N. Y. 569, 89 N. E. 2d 526 4
People v. Vogelstein, 150 Misc. N. Y. 714, aff. 242 App. Div. (N. Y.) 611 24
Phillips v. Mobile, 208 U. S. 472 26
Pugach v. Dollinger, 277 F. 2d 739 1

Rathbon v. United States, 355 U. S. 107 ..... 22, 24
Reg. v. Cox, L. R. 14 Q. B. Div. (Eng.) 153 24
Reid v. Colorado, 187 U. S. 137 27

Savage v. Jones, 225 U. S. 501 6
Schwartz v. Texas, 344 U. S. 199 (1952) 10, 11, 13, 28
Second Employment Liability Cases, 233 U. S. 1 ... 17
Sherlock v. Alling, 93 U. S. 99 27
Sims v. United States, 359 U. S. 108 32
Southern Pacific Company v. Arizona, 325 U. S. 761. 27
Stemmer v. People of the State of New York, 336 U. S. 963, petition for re-hearing denied, 337 U. S. 921 .....2, 3, 4, 6, 7, 10, 11, 13, 34

The Daniel Ball, 10 Wall. 557 (1871) 17
Townsend v. Yeomans, 301 U. S. 441 5-6

United States v. Gris, 247 F. 2d 860 16
United States v. United Mine Workers of America, 330 U. S. 270 32

Weiss v. United States, 307 U. S. 321 5
Weiss v. United States, 308 U. S. 321 .....5, 13, 14
Wilson v. United States, 221 U. S. 361 25

PAGE

Statutes

U. S. Const. Art. 1, Sec. 8 ..... 19, 21
U. S. Const. Fourth Amendment 23, 36
U. S. Const. Tenth Amendment 26, 36
New York Const. Art. 1, Sec. 12 .....14, 16, 22, *passim*
Sec. 605, Federal Communications Act ...16, 18, 19, *passim*
Sec. 501, Federal Communications Act 14
New York Code of Criminal Procedure, Sec. 813-a .. 13, 16, *passim*
New York Penal Law, Sec. 742 14-15

Legislative Reports

Congr. Rec. Index to Proceedings and Debates, 73rd Congress, Second session. Vol. 78, Part 12, January 3, 1934-June 18, 1934; House of Representatives, Report No. 1850, 73rd Congress, Second Session, June 1, 1934, page 3; Senate Report No. 781, 73rd Congress, Second Session, April 17, 1934 ... 29

83 Cong. Rec. (1938) 9453, 86 Cong. Rec. (1940) 9948-9949, 88 Cong. Rec. (1942) 4599; see S. 3756 (75th Cong. 3d Sess. 1938), H. J. Res. 571 (76th Cong. 3d Sess. 1940), H. J. Res. (77th Cong. 2d Sess. 1942) 29-30

86 Cong. Rec. (1940) 3116; see S. Res. 224 (76th Cong. 3d Sess. 1940); S. Rept. 1304 (76th Cong. 3d Sess. 1940) pp. 1, 7; 86 Cong. Rec. (1940) 889-890, 2693 30

Senate Hearings pp. 240-241, 648-650, 659-661, 817-819, Senate Committee on Interstate Commerce, United States Wire Tapping Investigation (S. Res. 224, 76th Congr. U. S. Govt Printing Office 1940-1941) 30

PAGE

Sub-Committee on Constitutional Rights, Committee on the Judiciary, U. S. Senate (S. Res. 62, 86th Congr., 1st Session, July 9, 1959) ..... 2 f.n.

New York State Commission of Investigation Public Hearings "Current Wire-tapping Dilemma in New York State • • • ", April 5, 1960 ..... 2 f.n.

IN THE

Supreme Court of the United States

October Term, 1960

No. 111

BURTON N. PUGACH,

Petitioner,

—vs.—

HONORABLE ISIDORE DOLLINGER, District Attorney of Bronx County, and HONORABLE STEPHEN P. KENNEDY, Police Commissioner of the City of New York,

Respondents.

BRIEF *AMICUS CURIAE*

THE DISTRICT ATTORNEYS' ASSOCIATION OF THE STATE OF NEW YORK

Interest of the *Amicus Curiae*

The serious dilemma of New York's law enforcement officers, posed by the *Benanti* decision, is whether to use the vital tool of telephone interception by law enforcement officers against crime, as the source of evidence in a state criminal prosecution—and run the risk that such official action would be in violation of Federal law, punishable as a misdemeanor (see concurring opinion of Judge Waterman, *Pugach* v. *Dollinger*, 277 F. 2d 739, 746)—or endanger the over-all security of the People of the State of New York

under the mandates of this Court's decision in *Benanti* v. *United States*.*

It is our earnest conviction that the holding in *Benanti*, so unprecedently disastrous to the administration of criminal justice in this state, and upon which the petitioner at bar wholly depends, should be re-examined, particularly in view of the Court's prior holding in *Stemmer* v. *People of the State of New York* (336 U. S. 963, Petition for re-hearing denied, 337 U. S. 921).

Summary of Argument

Benanti v. *United States* (335 U. S. 96), upon which petitioner relies, is in irreconcilable conflict with the Court's controlling precedent in *Stemmer* v. *People of the State of New York* (336 U. S. 963), re-hearing denied 337 U. S. 921) which was completely overlooked, both by this Court, and in the Court below.

New York State's statute (Article 1, Section 12, New York State Const. Sec. 813-a, New York Code of Crim. Pro.) for telephone interception by law enforcement officers, under safeguards consistent with a reasonable search and seizure, does not contradict the policy of Section 605 of the Federal Communications Act.

---

* See Appendix, pp. 2a-67a, testimony of *District Attorney Edward S. Silver, Kings County*, before the Sub-Committee on Constitutional Rights, Committee on the Judiciary, U. S. Senate (S. Res. 62, 86th Congr., 1st Session, July 9, 1959).

Testimony of *District Attorney Frank S. Hogan, New York County* (pp. 68a-108a), and *Police Commissioner Stephen P. Kennedy, City of New York* (pp. 109a-127a), Public Hearings, New York State Commission of Investigation, *"The Current Wire-Tapping Dilemma in New York State Created by Recent Federal Court Decisions"*, April 5, 1960.

Section 605 of the Federal Communications Act must be construed within the orbit of the Interstate Commerce clause, and not strictly as an anti-wiretapping statute, in order to save its constitutionality under Article 1, Section 8 of the United States Constitution.

Considering the legislative environment of Section 605, a construction that Section 605 was intended to apply to telephone interceptions under New York State law would be clearly unconstitutional and violative of the state's reserved police powers under the Tenth Amendment of the Constitution of the United States.

ARGUMENT

POINT FIRST

Benanti v. _United States_, 355 U. S. 96, upon which petitioner relies, is in irreconcilable conflict with the Court's controlling precedent in _Stemmer_ v. _People of the State of New York_, 336 U. S. 963, re-hearing denied, 337 U. S. 921.

A. The *Benanti* case was incorrectly decided.

With the utmost reverence and respect for the Court, we are constrained to submit that *Benanti* v. *United States*, 355 U. S. 96, upon which the Petitioner wholly relies, is in irreconcilable conflict with the Court's prior decision in *Stemmer* v. *People of the State of New York*, 336 U. S. 963, petition for rehearing denied 337 U. S. 921.

We further respectfully submit to the Court that, due to an inadvertent but serious error of omission in the Court below, (*Benanti* v. *United States*, 244 F. 2d 389), as well

as in this Court, the significant *Stemmer* decision was completely overlooked.

The decision of the United States Court of Appeals in *Benanti* was fatally defective in its inadvertent omission of reference to this Court's affirmance in *Stemmer* v. *People of the State of New York* (336 U. S. 963); petition for re-hearing denied, 337 U. S. 921, of the New York Court of Appeals decision in *People* v. *Stemmer* (298 N. Y. 728), to which it had referred in its opinion.

Further accenting this oversight, the United States Court of Appeals—evaluating the legality of New York's wire-tap procedure under court order—explicitly declared in its opinion—again inadvertently, but yet profoundly grave in its impact on the ultimate result—that "*the New York cases do not deal with this point; they concern only the admissibility in evidence in the New York courts of wire-tapping evidence.*"

As a footnote thereto, the Court appended the following citations:

> "*People* v. *Saperstein*, 2 N. Y. 2d 210—N. E. 2d—cert. den.—U. S. (April 29, 1957); People v. Feld, 305 N. Y. 312, 113 N. E. 2d 440; People v. Tieri, 300 N. Y. 569, 89 N. E. 2d 526; *People v. Stemmer*, 298 N. Y. 728; *Harlem Check Cashing Corp.* v. *Bell*, 296 N. Y. 15, 68 N. E. 2d 654 * * *." (Italics ours)

The fact of the matter is, as we shall presently show, that both the *Harlem Check Cashing* case and the *Stemmer* case were decisions of the New York Court of Appeals precisely predicated on the validity of New York's wire-tap procedure in the context of Section 605.

In the Matter of *Harlem Check Cashing Corp.* v. *Bell*, *supra*, the *per curiam* decision of the court held:

"We are not persuaded that we are constrained by the decision in *Weiss* v. *United States* (308 U. S. 321 to condemn *as illegal* the disclosure and divulgence, by use in evidence, of the intercepted messages which were recorded by tapping wires in accordance with the statutes of the State as expressly authorized by the Constitution of the State (N. Y. Const., art. I, Sec. 12; Code Crim. Pro., Sec. 813-a). That case dealt with intercepted telephone messages procured without a court order and in violation of the laws of this State (Penal Law, Sec. 1423, subd. 6) by a police officer acting under instructions of a post-office inspector, and the sole question decided was 'whether the (Federal) trial court properly received in evidence intercepted telephone communications' (*Weiss* v. *United States*, 307 U. S. 621, 308 U. S. 321, 326). While there are expressions in the opinion of the court which seem to go so far as to interpret the Federal statute as a substantive law forbidding all disclosure or divulgence, the decision was concerned only with the propriety of the receipt of such intercepted messages in evidence on the trial of a criminal case in a Federal court. *The State of New York having provided, by Constitution and statute, certain specific methods by which it may exercise its fundamental power of gathering evidence of criminality and of prosecuting crime, it surely is not to be assumed that Congress intended to circumscribe that power unless it unequivocally indicated such an intent. A Federal statute, it is recognized, must be presumed to be limited in effect to the Federal jurisdiction and not to supersede a State's exercise of its police power unless there be a clear manifestation to the contrary.* (*Townsend* v.

> *Yeomans*, 301 U. S. 441, 454; *Atchison Ry.* v. *Railroad Comm.*, 283 U. S. 380, 392-393; *Savage* v. *Jones*, 225 U. S. 501, 533.)" (Italics supplied)

Likewise, in *People* v. *Superstein*, 3 N. Y. 2d 210, 214; 140 N. E. 2d 252, cert. den. 353 U. S. 946, the New York Court of Appeals again adverted to its previous decision in *Matter of Harlem Check Cashing Corp.* v. *Bell, supra*, and pointedly held:

> "The *Harlem* case holding was that *New York State's method of permitting the tapping of wires* and the admission into evidence of the recordings thereof is not a violation of Section 605 of the Federal Communications Act (U. S. Code, tit. 47, Sec. 605 * * *)". (Italics ours)

Thus, it conclusively appears that this Court, in *Benanti*, had been accidentally deprived, not only of a full and fair consideration of its own vital prior holding in *Stemmer* v. *People of the State of New York, supra*, but also of the judicial construction placed upon the issue by the New York Court of Appeals.

In fact, not one of these New York cases was mentioned in the briefs submitted to the Court by either party, whether the Petitioner *Benanti* or the Government—a *fait accompli* explainable only because the holdings of these very cases had been overlooked in the Court below as aforestated.

B. The *Stemmer* case is a controlling judicial precedent.

Directly drawn into contention in the *Stemmer* case, as in *Benanti* v. *United States, supra*, was the validity of the legalized wiretap under organic New York law (Article 1, Section 12, New York State Constitution; Section 813-a,

New York Code of Criminal Procedure), in relation to Section 605 of the Federal Communications Act.

The *Stemmer* case was unanimously affirmed by the New York Court of Appeals, as the decision itself notes, on the authority of its own prior decision in *Matter of Harlem Check Cashing Corp. v. Bell* (296 N. Y. 15, 1946, 68 N. E. 2d 854). There, in a *per curiam* decision, the State's highest Court held as follows:

> "Upon this appeal the following question was presented and necessarily passed upon: The appellants contended that the receipt in evidence of wire tapped telephone calls was illegal because of section 605 of the Federal Communications Act of 1934 (U.S. Code, tit. 47, Sec. 605). This Court held to the contrary. (See *Matter of Harlem Check Cashing Corp. v. Bell*, 296 N. Y. 15.) No opinion."
>
> *People* v. *Stemmer*, 298 N. Y. 728 (1948), 83 N. E. 2d 141.

The *Stemmer* case was subsequently affirmed in a *per curiam* decision by an equally divided court* in *Stemmer* v. *People of the State of New York* (336 U. S. 963, May 2, 1949) Mr. Justice Jackson not participating.

---

* "*Our judgment by a divided court is just as much our judgment for all the purposes of the case in hand as if it had been unanimous. The result of the appeal to us was an affirmance of what had been done below*" (*Durant* v. *Storrow*, 101 U. S. 555).

Whether the *Stemmer* decision, by an equally divided Court, petition for re-hearing denied by a full Court (Mr. Justice Jackson not participating) should or should not be deemed within the principle of *stare decisis* as a controlling judicial precedent, is not material. The point of emphasis is that it was entirely overlooked, and never considered for any purpose in the later *Irvanti* decision of the Court (See *Hertz* v. *Woodman*, 218 U. S. 205).

Petition for re-hearing was denied by a full Court, again Mr. Justice Jackson not participating (337 U. S. 921) May 31, 1949.

In the briefs filed in this Court, both the petitioner *Stemmer* and the respondent, *The People of the State of New York*, squarely put into issue the validity of legalized telephone interception under New York law.

The People's main thrust—both on certiorari and on the main appeal—was tersely and succinctly set forth in a single paragraph, constituting the entire brief of the Respondent. Because of its singular brevity and its crucial significance to the point here raised, it is here reproduced *in toto*:

> "Petitioners claim that the court improperly received the evidence (Stemmer pp. 4-9, Krakower pp. 5-6, 9-14). This is without basis. *The interceptions were properly made under State law, and the federal act is without application* (see Federal Law supra pp. 9-10; cf. affidavits and orders Dec. 2, 10, appendix 5-20; New York Penal Law Sec. 1423, subd. 6, appendix 21; New York Constitution, Art. I, Sec. 12, appendix 24; New York Code Crim. Proc. Sec. 813-a appendix 25; State Proceedings, supra pp. 5-8; also *Leon v. State* (1942), 180 Md. 279, 284, 23 Atl. (2d) 706, 709, *cert. den. sub nom. Neal* v. *Maryland*, 316 U. S. 680; Law and cases, appendix 47)." (Italics supplied)

Again, in the petition for a re-hearing submitted to this Court, the petitioner *Stemmer* starkly adverted to the fact that on the argument of the main appeal to this Court, "*counsel for the State of New York rested his argument that state officers were not included in the ban on the Fed-*

eral Communications Act * * *" (Pet. Br. p. 3); and again reiterated by strenuous counter-argument in the brief, the People's principal contention that state law enforcement agents were exempt from the anti-interception provisions of the Federal law (Pet. Br. p. 4).

In summary, we are impelled to the conclusion that the Court's decisions in *Benanti* and *Stemmer*, respectively, are in fundamental estrangement with each other on the single central question common to both—necessarily and actually drawn into question in each case—viz. the validity of New York's laws in relation to Section 605.

In *Stemmer*, which affirmed the New York Court of Appeals' judgment in reliance on *Harlem Check Cashing Corp. v. Bell*, the legalized interception by state law enforcement officers under New York law was implicitly, if not explicitly, held lawful and not in violation of Section 605 of the Federal Communications Act; in *Benanti*, however, the Court reached a diametrically opposite result in holding that New York State law enforcement agents were in violation of Federal law.

Further, we are fairly fortified in our evaluation of *Stemmer* by recent decisions of the New York Court of Appeals, subsequent to the *Benanti* decision on December 9, 1957, which were pointedly left undisturbed by this learned Court in its consistent denial of petitions for certiorari in each case.

(*People* v. *Graziano*, (1958), 4 N. Y. 2d 881, 150 N. E. 2d 768, cert. den. 358 U. S. 851. *People* v. *Broady* (1959), 5 N. Y. 2d 500, 6 N. Y. 2d 814, 158 N. E. 2d 817, 159 N. E. 2d 690, cert. den. and appeal dismissed *per curiam*, 361 U. S. 8.)

(*People* v. *Dinan*, 1959, 6 N. Y. 2d 715, 158 N. E. 2d 501, cert. den. 361 U. S. 839.)

C. *Schwartz* v. *Texas* is wholly inapplicable to the case at bar.

We regrettably note too, that even *Schwartz* v. *Texas*, 344 U. S. 199 (1952), contains the same grave error of omission regarding the *Stemmer* case. At page 202 of the Court's opinion appears the following statement:

> "This question has been many times before the state courts, and they have uniformly held that Sec. 605 does not apply to exclude such communications from evidence in state courts. Leon v. State, 180 Md. 279, 23 A 2d 706; *People* v. *Stemmer, 298 N. Y. 728, 83 N. E. 2d 141*; Harlem Check Cashing Corp. v. Bell, 296 N. Y. 15, 68 N. E. 2d 854; People v. Channell, 107 Cal. App. 2d 192, 236 P 2d 654. *While these cases are not controlling here*, they are entitled to consideration because of the high standing of the courts from which they come." (Italics supplied)

We say it earnestly, in retrospect, that it is altogether apparent that had the *Stemmer* case been duly accredited with its baptismal of affirmance and crown of denial of petition for re-hearing in this tribunal of ultimate decision, *Schwartz* v. *Texas, supra*, might well have fortuitously served as a suitable proving ground of decision in the evolving construction of Section 605, clearly delineating the "dirty business" of Texan wiretapping there postulated as one wholly distinguishable from the legalized procedure of New York law, studded with restraints closely akin to the constitutional safeguards of a reasonable search and seizure.

The Petitioner would ambitiously have this Court overrule *Schwartz v. Texas, supra* (Pet. Br. p. 18), on the ground that "*Schwartz* has encouraged state officials, district attorneys and judges to become parties to a criminal act in the very Court room that is supposed to represent law and order".

Our answer, in brief, is that *Schwartz v. Texas*—propounded in a backdrop of illegal wire-tapping grossly offensive to the policy against unreasonable search and seizure (*Goldstein* v. *United States*, 316 U. S. 114)—simply does not apply to the case at bar.

In view of the singular and enormously significant oversight, both in *Benanti* v. *United States, supra,* and in *Schwartz v. Texas, supra,* which have defaulted the Court's landmark guide of decision in *Stemmer v. People of the State of New York,* and in view of the extraordinary consequences which have befallen the courts and law enforcement officers of the State of New York, so graphically demonstrated in the case at bar, we respectfully urge upon the Court a conceptual re-consideration of *Benanti* v. *United States.*

We urge the Court that the re-consideration of *Benanti* is particularly called for, in the light of the further special fact that *Benanti* was decided in a setting of a Federal prosecution, measured against the fact that *Stemmer* had been addressed specifically to a New York criminal proceeding, as in the case at bar.

POINT SECOND

The *Benanti* decision upon which petitioner wholly relies, should be re-considered.

A.

The common capillary coursing through the veins of the *Benanti* decision by this Court were the *Nardone* decisions "which laid down the underlying premises upon which is based all subsequent consideration of Section 605" (*Benanti* v. *United States, supra*, at page 100).

Threading through the *Nardone* cases, in turn, was the "dirty business" of illegal, unauthorized and unbridled wire-tapping by Federal agents, permeating *Olmstead* v. *United States* (277 U. S. 438)—which, only by the narrowest of margins, was reprieved from the outright condemnation of the Fourth and Fifth Amendments.

In both *Nardone* cases, the factual pattern presented was that of substantially unregulated wire-tapping by Federal agents, with no prior effective restraints of judicial direction or control.

In *Nardone* v. *United States*, 302 U. S. 379, at page 383, the Court declared its underlying rationale:

> "The answer to the question is one of *policy*. Congress may have thought it less important that some offenders should go unwhipped of justice than that the officers should resort to methods *inconsistent with ethical standards and destructive of personal liberty.*" (Italics ours)

This view was reiterated in the later *Nardone* case, (308 U. S. 338), again holding that its previous construction of

Section 605 "*was the translation into practicality of broad considerations of morality and public well-being.*"

Looming in the background was *Olmstead* v. *United States, supra.* There, in Mr. Justice Holmes' classic dissent, the illegal wire-tapping of Federal Prohibition agents in palpable violation of the laws of the State of Washington, was held "an odious crime against state law", in which the Government's "criminal act" played an "ignoble part".

Olmstead has been the bedrock corner-stone in the evolving monolith of the cases following *Nardone: Weiss* v. *United States,* (308 U. S. 321); *Goldstein* v. *United States* (316 U. S. 114), and *Schwartz* v. *Texas* (344 U. S. 199).

In *Weiss* v. *United States, supra,* the wire-tapping by police officers acting under instructions of a United States Post Office inspector, was in violation of the explicit law of New York (Consolidated Laws of New York, Chapter 40, Section 1423, Subdivision 6)—ante-dating its present wire-tapping statute (Article 1, Section 12, New York State Constitution, Section 813-a, Code of Criminal Procedure)—and was done, as this Court declared, "*in the teeth of Section 1423, Subdivision 6 of the Penal Law of the State of New York, making wire-tapping a crime*".

There is a fundamental difference, however, between the "dirty business" postulated by these decisions, as against the Constitutionally mandated, statute-implemented, and judicially-controlled wire-tapping under New York law (Appendix 30a-31a).

Here, as in *Stemmer* v. *People of the State of New York, supra,* heretofore affirmed by this court, the Petitioner was no victim of illegal or unethical practices of state law en-

forcement officers, such as was properly condemned in *Olmstead, Nardone, Goldstein, Weiss,* and *Schwartz v. Texas.*

Rather, the gathering of evidence was under a circumspect statute containing every built-in pre-condition for a reasonable search and seizure.

Paraphrasing the very language of Mr. Justice Brandeis in *Olmstead v. United States, supra,* at pages 471-2: "* * * If wire-tapping can be deemed a search and seizure within the Fourth Amendment", such wire-tapping as was practiced in the case at bar was a *reasonable* search and seizure, and the evidence thus obtained was admissible.

B.

The law in New York is even more comprehensive in scope than is Section 605 of the Federal Communications Act. It has outlawed wire-tapping absolutely, even by imbedding the ban as an integral part of the search and seizure provisions of the New York Constitution (Art. 1, Sec. 12).

The penalty provisions, applicable to law enforcement officers and others alike, are certainly more severe than Federal law provides—declaring a violation a felony punishable by a maximum two-year term, as against the counterpart one-year maximum for the Federal misdemeanor (*Sec. 813-b, New York Code of Criminal Procedure; cf. Section 501 Federal Communications Act*).

Heavily implementing this statute is a penal provision barring the possession of wire-tapping instruments. Section 742 of the New York Penal Law provides that one guilty of the possession of instruments "under circum-

stances evincing an intent to unlawful use or employ or allow the same to be so used or employed for eavesdropping or knowing the same is intended to be so used, shall be guilty of a misdemeanor and if he has been previously convicted of any crime, he shall be guilty of a felony."

New York statute authorizes interception by law enforcement officers only upon order duly issued by a Justice of the Supreme Court or Judge of a County Court, or of the Court of General Sessions of the County of New York.

The order must be supported upon oath or affirmation of a District Attorney, or of the Attorney General, or of a police officer above the rank of Sergeant "*that there is reasonable ground to believe that evidence of crime may be thus obtained.*" The affidavit must particularly describe the person or persons whose communications, conversations, or discussions are to be overheard or recorded and the purposes thereof, with full identification of the particular telephone number embraced by the order.

In connection with its issuance, the Judge "may examine on oath an applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable ground for the granting of such application. The order shall be effective for the time specified therein, but not for a period of more than two months, unless extended or renewed by the Judge upon satisfying himself that such extension or renewal is in the public interest."

POINT THIRD

New York State's statute for telephone interception by law enforcement officers, under safeguards consistent with a reasonable search and seizure, does not contradict the letter or policy of Section 605 of the Federal Communications Act.

A. The New York statute is implementive of Section 605 and the Interstate Commerce clause.

New York's constitutional and statutory scheme for telephone interception by state law enforcement officers, under appropriate court order, issued only when "there is reasonable ground to believe that evidence of crime may be thus obtained" (*Art. I, Sec. 12, New York State Constitution; Sec. 813-a, New York Code of Criminal Procedure*) is clearly neither in contradiction of the interstate commerce clause of the Constitution, nor of the "policy considerations motivating Section 605" (*Benanti* v. *United States, supra*).

I.

Section 605 of the Federal Communications Act was clearly intended to further the lawful purposes of communication, rather than those for a corrupt, unlawful, or criminal end.

To hold otherwise, would amount to a stultification and patent self-emasculation of the Congressional intent (see *United States* v. *Gris*, 247 F. 2d 869), and to a fatal subversion of the interstate commerce clause from which Section 605 was derived.

The power to regulate commerce is the power to outlaw or restrain an obstruction to commerce (*Second Employers Liability Cases*, 223 U. S. 1, 47, 53-4); to provide for its "protection and advancement" ("*The Daniel Ball*", 10 Wall. 557, 564 (1871); "to promote its growth and insure its safety" (*Mobile County* v. *Kimball*, 102 U. S. 691, 696-7 (1881)); to guard against obstructions by state legislation of the instruments of commerce (*Federal Radio Comm.* v. *Nelson Bros., B & M Co.*, 289 U. S. 266, 279).

In *Goldman* v. *United States* (316 U. S. 129), involving a direct construction of Section 605, the Court declared, at page 133:

> "The protection intended and afforded by the statute is *the means of communication* and not of the secrecy of the conversation." (Italics supplied)

In *Brooks* v. *United States*, (267 U. S. 432, 436), construing the National Motor Vehicle Theft Act in the context of the interstate commerce clause, the Court flatly held:

> "*Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, or the spread of any evil or harm to the people of other states from the state of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce*".

Further, the Court characterized the act of interstate transportation of a stolen motor vehicle as a "*gross abuse of interstate commerce*".

As a corollary proposition, it is clear that New York's statute designed to obtain evidence of crime, is likewise proper as a potent sifting device for the legitimate purposes of interstate commerce.

The sender of a communication which would unlock the door to a murder or robbery, or spill a confession of guilt to a heinous crime, either consummated or in the planning stage, or lead a state law enforcement officer to a denouement of an espionage against the security of the state, or bag an illegal wire-tapper to preserve the integrity of communications under Section 605, or solve a serious maiming as in the case of *Pugach*—these are not the kind of communications which the Congress ever intended to protect against interception under the sheltering force of the commerce clause.

> *"There is a manifest difference between the case of a private individual who intercepts a message from motives of curiosity or to further personal ends, and that of a responsible official engaged in the governmental duty of uncovering crime and bringing criminals to justice."*

Dissent of Mr. Justices Sutherland and McReynolds in *Nardone* v. *United States*, 302 U. S. 379, 386.

B. Unless so construed, Section 605 would be unconstitutional and void as an unreasonable exercise of the power of Congress to regulate interstate commerce.

If Sec. 605 is to be construed strictly as a wire-tapping statute, within the "police power" of the Federal Government—rather than as an incidental exercise of the power of Congress to regulate interstate commerce—then patently, the statute must fail for unconstitutionality because the

police power is reserved exclusively to the States, and not to the Federal Government.

Hamilton v. *Kentucky Distilleries & W. Co.*, 251 U. S. 146.

Section 605 must stand or fall solely on the question of its proper application to interstate commerce, namely, whether or not a total ban on interception of telephone communcations, binding on every person—law enforcement officers or not alike, even as to New York's position at Lar—would be offensive to the reasonable use of the commerce clause of the Constitution (*Art. 1, Sec. 8, U. S. Const*).

C. An interception within the framework of a reasonable search and seizure does not militate against the policy considerations motivating Section 605.

A construction of Section 605 that would bar New York's state law officers from intercepting telephone communications to obtain evidence of crime would be an intolerable application of the Congressional power over interstate commerce. Such an exercise in frustration of the "policy considerations motivating Section 605" is unthinkable as expressive of the legislative intent.

Practical considerations alone would militate against any such interpretation. For one thing, it would inexorably lead to a dangerous spread of the already widespread vicious practice of illegal wire-tapping with little risk of detection—in gross defiance of New York law, no less than that of Federal law—at least to the full extent that lawful wire-tapping by state law officers is interdicted by Section 605.

The Petitioner himself put the issue in sharp focus:

> "In the light of the so-called legal taps, the figures of the private professional tappers must be staggering and the right of privacy of telephonic communication despite Section 605 is, for all purposes, a figment of the imagination". (Pet. Br. p. 11).*

It is fantastic to believe that Section 605 was ever intended to require so topsy-turvy a construction—as the petitioner now urges upon this Court—that a legalized interception duly granted to a New York state law officer pursuant to a state statute, the State Constitution, and a Court

---

* *Parenthetically, the figures given by Petitioner as to court-ordered wiretaps in New York City require clarification* (Pet. Br. p. 10, footnote 3).

In 1952, a representative year, all five district attorneys in New York City and the entire police—covering a population of 8½ million people—procured a total of 480 court orders (App. pp. 32a, 113a). *This figure is less than half the total indicated by the Petitioner for New York City.*

Petitioner's reference to the total number of orders "received by the telephone company in New York City" (1013 in the year 1953 and 1135 in the year 1954) apparently could refer only to the number of court orders received by the New York City Telephone Company as the central repository and authorizing agency for the telephone system affecting court orders issued throughout the entire state.

Statewide, for the five-year period 1950-1954, the total number of court orders procured by 61 of the 62 district attorneys in this State averaged 479 a year, covering a population of almost 15 million people (App. p. 32a).

Over the eight year period, between 1952 and 1959, the New York City Police Department obtained an average of 290 court orders per year (App. pp. 81a, 113a-114a).

Our conclusion is precisely borne out by Prof. Westin's article in Commentary, April, 1960: "In 1954 1,135 court orders were obtained by all the law enforcement agencies in the State of New York, with a population of almost 15 million." (Reported in Hearings before Subcommittee on Constitutional Rights, Committee on the Judiciary (S. Res. 62, 86th Cong. 1st Session), Part 5, "Wiretapping, Eavesdropping and the Bill of Rights", p. 1960.)

authorization, be not only invalidated as to all cogent evidence of crime thus obtained—even to the extent of a Federal injunction—but implicate the law officer himself in the commission of a Federal crime punishable under Section 501.

Such a patently excessive use of the power over interstate commerce—"*leading to absurd or wholly impracticable consequences*"—would itself render Section 605 invalid for unreasonableness (*Caminetti* v. *United States*, 242 U. S. 470, 490; Art. 1, Sec. 8, U. S. Const.).

Mr. Justices Sutherland and McReynolds, dissenting in *Nardone* v. *United States*, 302 U. S. 379, 385, 387, give poignant substance to our argument:

> "*The decision just made will necessarily have the effect of enabling the most depraved criminals to further their criminal plans over the telephone, in the secure knowledge that even if these plans involve kidnapping and murder, their telephone conversations can never be intercepted by officers of the law and revealed in court.* * *"
>
> "*My abhorrence of the odious practices of the town gossip, the peeping Tom, and the private eavesdropper is quite as strong as that of any of my brethren. But to put the sworn officers of the law, engaged in the detection and apprehension of organized gangs of criminals, in the same category, is to lose all sense of proportion.* * * *In the light of the deadly conflict constantly being waged between the forces of law and order and the desperate criminals who infest the land, we well may pause to consider whether the application of the rule which forbids an invasion of the privacy of telephone communications is not being carried in the present case*

to a point where the necessity of public protection against crime is being submerged by an overflow of sentimentality.''

Section 605 ''*must be interpreted in the light of reason and common understanding to reach the results intended by the Legislature*'' (*Rathbon* v. *United States*, 355 U. S. 107, 109).

Viewed thusly, it becomes obvious that Section 605 and Article I, Sec. 12 of the New York State Constitution are complementary statutes. ''*The public good is the end and aim of both*'' (see *Gilman* v. *City of Philadelphia*, 70 U. S. 713, 730).

D. Authorization of the sender is not required under a New York court-ordered interception.

As is plain from the wording of the statute, Section 605 does not outlaw interception of telephone communications absolutely. The ban is limited as to interceptions only ''*not being authorized by the sender*''.

It is thus clear that the thrust of the statute is to protect the means of communication, rather than the privacy of the sender—enforceable or not, at his own instance. This is a right which could be waived by outright consent or authorization, as explicitly set forth in Section 605, or by operation of law as in the case of a sender whose message is intercepted by a reasonable search and seizure, to obtain evidence of crime.

In close analogy, even the absolute right of privacy of the mails must yield to the right of official interception based on a reasonable search and seizure to obtain evidence of crime (*Matter of Jackson*, 96 U. S. 727, 733). ''*There is*,

in essence, no difference between the sealed letter and the private telephone message", stated Mr. Justice Brandeis in *Olmstead* v. *United States, supra,* at page 474.

The fixed policy of the Court, in construing cases relative to the admissibility of evidence under Section 605 is to apply the principles of a reasonable search and seizure, short of the Fourth Amendment itself.

"*Although the unlawful interception of a telephone communication does not amount to a search or seizure prohibited by the Fourth Amendment*" (*Goldman* v. *United States*, 316 U. S. 129; *Olmstead* v. *United States*, 277 U. S. 438), said this Court in *Goldstein* v. *United States*, 316 U. S. 114, 120, "*we have applied the same policy in respect of the prohibitions of the Federal Communications Act* * * *".

It must logically follow that the same policy should guide the Court in a construction of the *method* of interception by which the evidence is obtained.

A court-sanctioned interception, under warrant of organic New York law, predicated on principles substantially identical to a reasonable search and seizure, was no more intended to be reached by Section 605—in aid of the free flow of interstate commerce—than would, say, an alleged privileged communication between malefacting parties be suffered to shield the plottings of a criminal conspiracy inimical to the legitimate purposes of commerce.

The same principles of waiver by operation of law has been applied to the right of privacy in other situations. For example, to the sanctuary of alleged attorney-client relationships, where "*if the communication be made in furtherance of any criminal or fraudulent purpose, it is not*

privileged" (*Alexander* v. *United States*, 138 U. S. 353, 359). See also *Clark* v. *United States*, 289 U. S. 1, 15-16; *Reg.* v. *Cox*, L. R. 14 Q. B. Div. (Eng.) 153; *Wharton's Crim. Evid.*, 11th Ed., Sec. 1233; *People* v. *Farmer*, 194 N. Y. 251, 269, 87 N. E. 457; *People* v. *Vogelstein*, 150 Misc. N. Y. 714, aff. 242 App. Div. (N. Y.) 611; 125 A. L. R. 511.

Again, Mr. Justice Cardozo, speaking for a unanimous Court in *Clark* v. *United States* (289 U. S. 1, at p. 14), held, as to the privilege against disclosure of a jury's deliberations:

> *" • • • we think the privilege does not apply where the relation giving birth to it has been fraudulently begun or fraudulently continued • • • The privilege takes as its postulate the genuine relation, honestly created and honestly maintained. If that condition is not specified, if the relation is merely a sham and pretense, the juror may not invoke a relation dishonestly assumed as a cover and cloak for the concealment of truth".*

By parallel reasoning, *Rathbon* v. *United States, supra*, decided simultaneously with *Benanti*, held that the interception of a telephone conversation between a would-be murderer and his intended victim by means of a telephone extension, was admissible even though it was expressly shown that there was no authorization of the sender.

Similarly, the absence of authorization or consent was not fatal to the surreptitious transmission of a private conversation by use of a detectophone placed on the outer wall of the defendant's hotel room (*Goldman* v. *United States*, 316 U. S. 129) or to an overheard conversation of a narcotic peddler by means of a radio transmitter secreted on a Gov-

ernment under-cover agent (*On Lee* v. *United States*, 343 U. S. 747). Said this Court in the *On Lee* case, at page 754:

> "The use of bifocals, field glasses or the telescope to magnify the object of a witness' vision is not a forbidden search or seizure, *even if they focus without his knowledge or consent upon what one supposes to be private indiscretions.* It would be a dubious service to the genuine liberties protected by the Fourth Amendment to make them bedfellows with spurious liberties, improvised by farfetched analogies which would liken eavesdropping on a conversation, with the connivance of one of the parties, to an unreasonable search or seizure. We find no violation of the Fourth Amendment here." (Italics supplied)

It might be urged in contention that the "sender" might himself be an altogether innocent participant in the communication intercepted. The answer is that the sender's own innocence would no more require an authorization to an interception, if lawfully authorized by court order to obtain evidence of crime than would, say, the consent of a party to a reasonable search and seizure depend upon the custodian's own innocence or involvement with crime (See *Wilson* v. *United States*, 221 U. S. 361).

Nor would the right to invoke the privilege between attorney and client "depend upon the showing of a conspiracy, upon proof that client and attorney are involved in equal guilt. *The attorney may be innocent, and still the guilty client must let the truth come out.*" (*Clark* v. *United States*, *supra*, p. 15).

POINT FOURTH

A construction that Section 605 applies to telephone interceptions under New York Law (Article I, Section 12, New York State Constitution: Section 813-a New York Code of Criminal Procedure) would be clearly unconstitutional and violative of the states' reserved police powers under the Tenth Amendment of the Constitution of the United States.

A. The police power under the Tenth Amendment.

> *"The police powers of a State form a portion of that immense mass of legislation which embraces everything within the territory of a State not surrendered to the General Government, all which may be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State . . . are component parts of this mass".*
>
> *Phillips* v. *Mobile*, 208 U. S. 472, 479.

The exercise by a State of its police power will not be interfered with unless it is exercised arbitrarily or unreasonably.

Hadachek v. *Sebastian*, 239 U. S. 394; *Jones* v. *Portland*, 245 U. S. 217; *Nashville, C. & St. L. R. Co.* v. *Walters*, 294 *U. S.* 405.

The intention of Congress to exclude the states from exercising their police power must be clearly manifested to justify a holding that the state legislation conflicts with the Federal law (*International Union U. A. W. A. F. of L.* v. *Wisconsin Employment Labor Relations Board*, 336 U. S. 245, re-hearing denied 336 U. S. 970).

The Congressional intention to displace local laws in the exercise of its commerce power should not generally be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose; particularly when public safety and health are concerned. *Maytrer* v. *Hamilton*, 309 U. S. 598; *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148; *Sherlock* v. *Alling*, 93 U. S. 99; *Reid* v. *Colorado*, 187 U. S. 137; *Clason* v. *State of Indiana*, 306 U. S. 439.

In *Southern Pacific Company* v. *Arizona*, 325 U. S. 761, 766, the Court held:

> "*Congress, in enacting legisaltion within its constitutional authority over interstate commerce, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless its purpose to do so is clearly manifested* (cases cited), *or unless the state law; in terms or in its practical administration, conflicts with the Act of Congress, or plainly and palpably infringes its policy* (cases cited)."

Similarly, in *Penn Dairies* v. *Milk Control Commission*, 318 U. S. 261:

> "*An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. Considerations which lead us not to favor repeal of statutes by implication* • • • *should be at least as persuasive when the question is one of the nullification of state power by congressional legislation.*

And, in *Schwartz* v. *Texas*, 344 U. S. 199:

> *"Where a state has carefully legislated so as not to render inadmissible evidence obtained and sought to be divulged in violation of the laws of the United States, this Court will not extend by implication the specific language of the state statute. If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed."*

Applying these salient principles of Constitutional construction at bar, we respectfully submit that the legislative environment of Section 605 requires a construction that the Congress never intended to interdict New York's law enforcement officers from intercepting telephone communications, under Court order, to obtain evidence of crime, and that any construction to the contrary would be in violation of the States' reserved police powers under the Tenth Amendment of the Constitution of the United States.

B. Legislative environment.

History of the Act.

It is an insupportable assumption that Section 605 was ever intended to apply to a New York State interception under Article I, Section 12 of the New York State Constitution. This is conclusively borne out, not only by the explicit language of the Act itself, but by its legislative history.

There is not a word in the Congressional debates attending the passage of the Federal Communications Act of 1934, or the Radio Act of 1927 from which it was derived, to

suggest or intimate that a state law enforcement officer was intended to be covered by Section 605 of the Act (see *Nardone* v. *United States*, 302 U. S. 379).

An objective examination of the debates and the proceedings in the Congress discloses no intention whatever on the part of the Congress to put law enforcement officers within the ambit of control of Section 605 of the Act (*Congr. Rec. Index to Proceedings and Debates, 73rd Congress, Second session, Vol. 78, Part 12, January 3, 1934-June 18, 1934; House of Representatives, Report No. 1850, 73rd Congress, Second Session, June 1, 1934, page 3; Senate Report No. 781, 73rd Congress, Second Session, April 17, 1934*).

On the contrary, an examination of the legislative design of the Radio Act of 1927 (Ch. 169, February 23, 1927), from which Section 605 of the Federal Communications Act is derived, discloses that the parent statute expressly authorized the monitoring by the Government of offensive and obscene radio transmissions.

In 1937, in *Nardone* v. *United States*, 302 U. S. 379, the Court had held that Congress, by its passage in 1934 of Section 605 of the Federal Communications Act, had forbidden entirely the use of such interceptions by federal officers. During the years which followed, a number of unsuccessful measures were proposed to change this rule as to federal officers, debate on which measures showed Congress' awareness of the different interception policy adopted by New York State (*83 Cong. Rec. (1938) 9453, 86 Cong. Rec. (1940) 9948-9949, 88 Cong. Rec. (1942) 4599;*

see S. 3756 (75th Cong. 3d Sess. 1938), H. J. Res. 571 (76th Cong. 3d Sess. 1940), H. J. Res. (77th Cong. 2d Sess. 1942).

In 1940 Congress undertook an investigation of all interceptions, including those used in State crime detection, to determine whether or not such practices called for remedial legislation (*86 Cong. Rec. (1940) 3116; see S. Res. 224 (76th Cong. 3d Sess. 1940); S. Rept. 1304 (76th Cong. 3d Sess. 1940) pp. 1, 7; 86 Cong. Rec. (1940) 889-890, 2693*).

A subcommittee held extended hearings, the New York practice was considered, and Congress took no action (*Senate Hearings pp. 240-241, 648-650, 659-661, 817-819, Senate Committee on Interstate Commerce, United States Wire Tapping Investigation (S. Res. 224, 76th Congr. U. S. Govt. Printing Office 1940-1941*).

Following the Court's decision in *Benanti*, in a statement on the floor of the United States Senate on behalf of the McClellan Bill (S. 3013), to amend Section 605 so as to authorize state law enforcement officers to intercept telephone communications under statutes permitting wiretapping by court order, Senator McClellan stated:

> "* * * *Congress has never intended to permit the criminal to use the means of modern communication with impunity by enjoining law-enforcement agencies from intercepting his communications. To accept such interpretation would mean that Congress intended to give criminals free license and encouragement to use communications without fear or handicap and * * * grant these criminals a 'privileged sanctuary'*". (*Appendix*, 35a-36a)

Addressing itself specifically to the *Benanti* decision of the Court, and to the need for corrective action, the *New York State Joint Legislative Committee on Privacy of Communications* (*Leg. Doc. No. 25 (1959), p. 19*).*

> "*We do not believe for an instant that the Congress intends to override and supersede the police power of New York* • • • ".

The language of Section 605.

It is particularly significant that the protection of privacy afforded by the Federal statute, under Section 605, is expressly subordinated "*in response to a subpoena issued by a Court of competent jurisdiction or on demand of other lawful authority*". Here, explicitly, is patent statutory recognition of the paramount right of enforced disclosure to the state as against the right of privacy to the individual. *Instanced here is that the authorization of the sender is wholly immaterial.*

Again, the word "person" is expressly defined in the Federal Communications Act as follows:

> "*A 'person' includes an individual, partnership, association, joint stock company, trust, or corporation.*"

In this special definition of the word "person" contained in the Act, the Congress made no modification whatever of the Rules of Construction set forth in the Code of Laws of the United States of America (*Title 1, United*

---

* *Reported in Hearings before Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate (S. Res. 62, 86th Congr., 1st Session), Part 5, "Wiretapping, Eavesdropping and the Bill of Rights", p. 1847.*

States Code, Section 1), defining the word "person" as follows:

> "• • • • *The word 'person' may extend and be applied to partnerships and corporations, and the reference to any officer shall include any person authorized by law to perform the duties of such office* • • • •"

The deliberate omission of a law enforcement officer, within the definition of the word "person" under the Federal Communications Act—especially in the context of the Congress' expressly declared intent to breach the privacy of radio and telephone communications on subpoena of the Court or on demand of a lawful authority, clearly manifested the positive will of the Legislature to restrict the provisions of the Federal Communications Act to persons other than law enforcement officers.

As a rule of construction, the question whether the word "person", as used in Section 605 of the Federal Communications Act, applies to a "State" or "Officer" is to be determined from the "legislative environment" of the Statute (*Sims* v. *United States*, 359 U. S. 108; *United States* v. *United Mine Workers of America*, 330 U. S. 270; *Ohio* v. *Helvering*, 292 U. S. 360, [illegible]; *Georgia* v. *Evans*, 316 U. S. 159).

In *Sims* v. *United States, supra*, this Court declared anew its long-tested formula of statutory construction:

> "*Whether the term 'person', when used in a Federal statute includes a State, cannot be abstractly declared, but depends upon its legislative environment* (cases cited)."

In *United States* v. *United Mine Workers of America*, *supra*, at page 275, this Court stated:

> "*There is an old and well-known rule that statutes which, in general terms, divest pre-existing rights or privileges, will not be applied to the sovereign without express words to that effect* . . ."

Delving further into Sec. 605, we find that Congress provided that no person having received an intercepted communication or having become acquainted with its contents, "shall divulge or publish the existence, contents, substance, purport, effect or meaning of the same or any part thereof, or use the same or any information therein contained *for his own benefit, or for the benefit of another not entitled thereto.*"

It is manifest that these qualifying words in the Act further bolster the construction that the Congress never intended to proscribe a law enforcement officer within its terms.

It would be stretching all logic to the breaking point, to say that the use of an intercepted communication by a District Attorney in the prosecution of crime was one "for his own benefit" as an individual, rather than as a "judicial officer" for the public benefit.

Thus, applying the "legislative environment" standard laid down by this Court to Section 605 of the Federal Communications Act, it is clear beyond cavil that the interception of telephone communications banned by the Act was never intended to apply to State law enforcement officers, acting pursuant to lawful Court orders under the Statute and Constitution of the State of New York.

C. Other indicia of congressional intent.

First and foremost, of course, is the Court's own co
struction of Section 605 in relation to Article I, Section 1
of the New York State Constitution, in *Stemmer* v. *Peop*
of the State of New York, *supra*.

Secondly, is the contention of the Government itself i
Benanti v. *United States*, *supra*, before this Court. There
the Solicitor General urged upon the Court that Congres
had no intention of preventing legal wire-tapping unde
Court order, pursuant to New York Law (Article 1, Sectio
12 of the New York State Constitution; Section 813-a o
the New York Code of Criminal Procedure) (*Brief of th*
United States, pp. 15-18-19).

The Government's unequivocal contention was as follows

> "*A Federal law should not be construed to nullif*
> *by implication a state law regulating its interna*
> *affairs.*
>
> *If the New York City police, acting pursuant to*
> *warrant issued by a state court, could legally inter*
> *cept the telephone communications to and from th*
> *Reno Bar, then the trial court was entirely justifie*
> *in accepting the evidence entirely apart from th*
> *argument set forth in Point I, supra. However, th*
> *court below held that because of the supremacy o*
> *federal law, Section 605 of the Communications Ac*
> *took precedence over the New York law. We urg*
> *that, in view of the reluctance of the Court to inter*
> *pret a federal law as nullifying by implication*
> *state enactment, the Communications Act should b*
> *interpreted to permit both laws to stand.*
>
> *We are dealing here with intergovernmental rela*
> *tions where it is important that each sovereign b*

permitted to act with as little restriction as possible within its field of jurisdiction so long as no undue interference is caused to the jurisdiction of the other. In line with this policy, the courts have repeatedly held that federal laws of apparently general application should not be construed to outlaw state action . . . .

In reviewing the legislative history of the Federal Communications Act, the Government's brief in support of the legality of New York's wire-tap procedure specifically noted that "Congress carefully preserved areas of state regulation throughout the enactment".

It pointed up the statement by Senator Dill, Chairman of the Senate Committee on Interstate Commerce, who introduced the Bill, that: "*Ninety-eight percent of the telephone business of this country is within the states (78th Cong. Rec. 4139)*".

Again, at page 25 of the Government's brief:

> "*It follows that, since Congress has recognized intrastate telephone communication as a matter primarily of state concern, Section 605 should not be interpreted as preventing the people of a state from adopting the measures which they regard as necessary to their program of law enforcement. Our system of dual sovereignty confers responsibility for ordinary law enforcement primarily on the states. Congress, in regulating telephone communications, has recognized the interest of the states in that field. The combination of the various state interests involved in this problem suggests that only the clearest expression of Congressional intent should be permitted to prevent a state from adopting reasonable measures with respect to interception in aid of local law enforcement. Section 605 is not, we submit, that*

clear expression of Congressional intent to preempt the field which would prevent a state from adopting the kind of constitutional amendment and statute which New York has adopted and maintained since 1938".

CONCLUSION

The case at bar should be determined on the basis of the Court's precedent in *Stemmer* v. *People of the State of New York*, 336 U. S. 963, re-hearing denied, 337 U. S. 921, holding that interception of telephone communications pursuant to Article 1, Section 12 of the New York State Constitution, is not in conflict with Section 605 of the Federal Communications Act.

Such a construction of the federal statute would (a) give full effect to the manifest intent of Congress; (b) reconcile the Act to the Court's settled policy of determining all wiretap cases on the basis of principles faithful to the reasonable search-seizure requirements of the Fourth Amendment; and (c) preserve the constitutionality of Section 605 in the context of the reserved police powers under the Tenth Amendment.

December 6, 1960

Respectfully submitted,

THE DISTRICT ATTORNEYS' ASSOCIATION
OF THE STATE OF NEW YORK
Amicus Curiae

EDWARD S. SILVER
District Attorney

AARON NUSSBAUM
Assistant District Attorney
Of Counsel

FILE COPY

Office Supreme Court, U.S.
FILED
DEC
JAMES R. BROWNING, Clerk

No. 111

IN THE

Supreme Court of the United States

October Term, 1960

BURTON N. PUGACH,

Petitioner,

—vs.—

HONORABLE ISIDORE DOLLINGER, District Attorney of Bronx County, and HONORABLE STEPHEN P. KENNEDY, Police Commissioner of the City of New York,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO BRIEF *AMICUS CURIAE*

THE DISTRICT ATTORNEYS' ASSOCIATION OF THE STATE OF NEW YORK

EDWARD S. SILVER,
District Attorney, Kings County,
Municipal Building,
Brooklyn, New York,
Attorney for Amicus Curiae.

AARON NUSSBAUM,
Assistant District Attorney,
Kings County, New York,
Of Counsel.

32 Case Press Inc., 82 Beekman St., N. Y.—BEekman 3-2005

INDEX

	PAGE
Hearing Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate	1a
Testimony of Hon. Edward S. Silver	2a
Hearing Before the Commission of Investigation of the State of New York	68a
Testimony of Hon. Frank S. Hogan	69a
Testimony of Commissioner Stephen R. Kennedy	109a

APPENDIX

HEARING

BEFORE THE

SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

EIGHTY-SIXTH CONGRESS
FIRST SESSION

(PURSUANT TO S. RES. 62, 86TH CONGRESS, 1ST SESSION)

PART 3

WIRETAPPING, EAVESDROPPING, AND THE BILL OF RIGHTS

JULY 9, 1959

Senator Hennings. The committee will please come to order.

We have the honor of having with us today a very distinguished law enforcement official, distinguished lawyer, and legal scholar, the Honorable Edward S. Silver.

Mr. Silver is district attorney of Kings County, N. Y., and has been so for the past 6 years, I believe.

He is also past president of the New York State District Attorneys Association and is presently vice president and, as I understand it, president-elect of the National Association of County & Prosecuting Attorneys.

I can say more about Mr. Silver but will content myself at this time with introducing him in that fashion and letting him proceed in his own way, if he will, to discuss the matter now under consideration by this subcommittee. This is, as we all know, wiretapping, eavesdropping, and the Bill of Rights and cognate matters, with a view to ultimately suggesting some legislation or forebearing, indeed, to suggest legislation, if that be the decision, when our hearings are concluded.

So we welcome you here today, Mr. Silver, and thank you very much for your appearance.

You may proceed, of course, in any manner that you like.

STATEMENT OF HON. EDWARD S. SILVER, DISTRICT ATTORNEY, KINGS COUNTY, N. Y.

Mr. Silver. Mr. Chairman, Senator Carroll, it is a pleasure for me to be here.

Just so the record be straight, I am not the president-elect of the National Association of County & Prosecuting Attorneys.

Senator Hennings. That is what they told me.

Mr. Silver. I am the executive vice president. I think, according to the laws of succession it is a likelihood that I may become that at the end of July this year but I don't want to prejudice my chances for that post by any premature predictions.

Testimony of Hon. Edward S. Silver Before Senate Subcommittee on Constitutional Rights of Committee on the Judiciary

Senator Hennings. It is not a fait accompli, that is the point.

Mr. Silver. Mr. Chairman, it is a very unfortunate thing that when we discuss this subject, we have to use the words "wiretapping and eavesdropping" which in themselves—

Senator Hennings: They have a connotation.

Mr. Silver. A very evil connotation.

Senator Hennings. Like juvenile delinquency. But we have to use some words, or some phrase, to describe what we are talking about.

Mr. Silver. I was trying to think of a word, and perhaps someone will get a modern word or phrase for modern crime detection device. When we do that, we will be a bit ahead of the game. It will encourage clearer thinking of this subject before us.

I do want to say this about the testimony of Mr. Dash. He has so well said—I have given him every possible help I could in his inquiry, but the one thing that he has made clear is that no law or court decision will have much effect on unlawful wiretapping by private individuals, whether in labor or business, or police who are corrupt. At the outset I should say that the record of the district attorneys show that nobody has been more vigorous than we have been in making the laws as stringent as possible against any private people, not only doing any eavesdropping but even owning equipment. We must always keep in mind the distinction between law enforcement agencies who are fighting crime, and private persons or groups who use wiretapping for their nefarious purposes.

He has indicated that law enforcement agents have some reluctance about prosecuting people who are in violation of

eavesdropping laws. That is not so. In New York State where we have, as Mr. Dash has said, the most forward-looking and best laws on the use and control of wiretapping, we do not hesitate to prosecute people who violate the laws. In fact, in April of this year we indicted and convicted two police officers for improperly tapping a wire without a court order. They have of course been dismissed from the police department.

We even tried a deputy police inspector but the jury was evenly divided and the case resulted in a mistrial. After thoroughly reviewing the case everybody felt it better to dismiss the indictment and let the police department proceed with its departmental trial. After the jury disagreed we then dismissed it because we didn't think we could possibly prove the deputy inspector's guilt beyond a reasonable doubt.

We only indicate that to show that district attorneys, at least in my part of the country, have no hesitancy whatever to prosecute anybody against whom we have evidence of wrongdoing, even law enforcement officers.

Now, there are organizations, and there are people who feel they have to be against wiretapping, because by doing so it kind of makes them ipso facto "liberals," whatever that word means. I don't know just what it means—but if the term means a love and devotion and a constant watchfulness of our liberties as Americans, which I enjoy, and I want my kids and grandchildren to enjoy, then I will take the label too.

A lot of people are very careless about what they say when they deal with the problem of wiretapping. Every-

body sort of likes to wrap themselves around with the robes of Mr. Justice Holmes and Mr. Justice Brandeis and they talk about the *Olmstead* case (277 U. S. 438; 485 Ct. 564) and they like to use the term "dirty business" in connection with wiretapping, but I doubt whether 1 percent of those people have ever read the *Olmstead* case.

The *Olmstead* case dealt with a situation where Federal officers in connection with some bootlegging case in violation of the statutes[1] in the State of Washington unlawfully tapped wires and on the basis of these unlawful taps, convicted the defendants. It's important to keep in mind how the phrase "dirty business" was born.

Both Mr. Justice Holmes and Mr. Justice Brandeis said that law enforcing agents should not violate the law. No district attorney argues with that. Thus the *Olmstead* case and all talk of "dirty business" has no reference at all to a situation like the State of New York where our constitution in a provision similar to the search and seizure clause, and by enabling statutes, gives the district attorney and other law enforcing agent as higher police officials the right to tap wires under certain conditions. If they will sign an affidavit in which they say, under oath, that they have reason to believe they can get evidence of crime by setting forth sufficient facts to justify the conclusion, and subject themselves to examination by the court to justify the reasonableness of the request for the order, then and

[1] The Washington statute read as follows: "Every person * * * who shall intercept, read or in any manner interrupt or delay the sending of a message over any telegraph or telephone line * * * shall be guilty of a misdemeanor" (Remington's Comp. Stat. 1922, §§2656-18, 1922).

only then can an order be procured to tap a wire. The order is for a limited time of 2 months and can be renewed only on a showing of reasonableness.

Wiretapping by law enforcement agencies only with the proper safeguards which I have indicated doesn't mean that one is not very alert to civil liberties, with which I think all of us are very concerned. I would like to say that, for example, the New York State District Attorney's Association has sponsored more bills for the protection of defendants—I am talking about district attorneys—has sponsored more bills for the protection of defendants than the Civil Liberties Union or any bar association in our State.

Just to give you some of the things we have been sponsoring and trying to get our legislature to pass, we introduced the bill that an indigent defendant by getting a court order may get daily minutes and such moneys as he may need to hire experts to prepare his defense. The district attorneys introduced that, not the Civil Liberties Union or the bar associations.

Senator Hennings. You believe, Mr. Silver, as do some of us who have had experience in the prosecution of felonies in large cities, or indeed in smaller communities, you believe that the prosecutor, the district attorney, has a duty to the public and embraced within that duty is the duty to the defendant, to see that the defendant has a fair trial?

Mr. Silver. He had a very clear duty to the defendant, as I had occasion to say just that recently when the Legal Aid Society of our city at my suggestion and others sent over some of their lawyers to help defendants defend themselves.

Testimony of Hon. Edward S. Silver Before Senate Subcommittee on Constitutional Rights of Committee on the Judiciary

In a true sense, I never win or lose a case in the sense that a fellow wins or loses a ball game. We present the evidence we have. We are careful to see that the evidence is correct. If the jury comes out and says not guilty, I don't have the feeling that I have lost the case.

Senator Hennings. Prosecution isn't a game.

Mr. Silver. Exactly, Mr. Chairman.

Senator Hennings. We hear some claptrap about fellows who never lose cases. I have often said that the ones who never lose cases are those who have tried practically none, or liars.

Mr. Silver. I have, for example, a copy of my 1955 report and it is clear that I didn't write this in connection with this hearing—permit me to quote from the foreword of that report:

While I welcome comparison of the work of my staff with that of any other district attorney's office throughout the State, I have abstained from quoting percentage of successful prosecutions because of my sincere belief that it is not a true measure of the work of the district attorney's office. Justice, and only justice, must be our goal and a desire for results that will insure statistical excellence may frequently interfere with the attainment of this end.

It is philosophy which I am sure not only I hold but the vast number of district attorneys throughout the country.

Senator Hennings. You and I know when they start racking up their percentages of convictions those include many, many cases in which pleas of guilty are entered and in which the defendant doesn't even offer a defense.

Mr. Silver. Mr. Chairman, if I were concerned with the percentages of wins, I would just tell my grand jury de-

partment, don't ever indict anybody unless you are pretty sure we will convict them in the trial court, which means that bums and crooks and racketeers would not be indicted because district attorneys would be concerned with their "batting averages."

We will give the hoodlums and racketeers as tough a time as we can if we have the legal rights to do it. We can never tell what additional evidence we can procure after indictment. If we have sufficient legal evidence to indict we do so. We are not concerned with percentage of wins.

If I may continue, for example, in New York State some crimes become a felony if they are committed the second time which are misdemeanors the first time. Under such a case we put the fact of the prior conviction in our indictment. We felt it is unfair to the defendant to read to the jury the fact that this man has been convicted of the same crime on a prior occasion. The jury is likely to feel he has been convicted of drunken driving once and the jury is likely to say, if the fellow was drunk once, I suppose he is guilty this time too.

We introduced a bill which would prohibit the district attorney from mentioning it during the trial of the case if the defendant would admit the prior conviction on the court record out of the hearing of the jury.

Again I say, the district attorneys introduced that, not the Civil Liberties Union, or the bar associations.

We have in New York State a law under which we can treat an offender under 19 years old as a youthful offender. Under the youthful offender treatment if a young man commits a crime, on the record he may say he has not been convicted of a crime.

Testimony of Hon. Edward S. Silver Before Senate Subcommittee on Constitutional Rights of Committee on the Judiciary

Now, sometimes the youthful offender may have gotten the youthful offender treatment even for perjury or some degree of robbery. He may testify against a defendant charged with a crime and he is not permitted to be cross-examined even about the act under which he got the youthful offender treatment.

In other words, the defendant has no way of attacking the credibility of a witness against him.

We have introduced legislation to say the defendant should have that right.

Again I say the district attorneys did that.

In some situations, where a man has been sentenced improperly, even though he may be a multiple offender, the thing may not come to light until after he has done more time on the crime than he should have on which the sentence is changed. In other words, he might have been given 5 to 10. He may have done 6 years of that or 5 years and then it is found that he should only get 3 but he is in jail on another crime. If he had done more time on one, he ought to be getting credit on the one that he is serving time.

The district attorneys are advocating that. The record is abundantly clear that district attorneys are vitally concerned with our rights as Americans. Let no one confuse the record when we advocate the use of wiretapping, with the proper safeguards of course, to fight crime it is not a violation of constitutional rights as such. Those rights are as sacred to us as to anyone. The record shows it.

If I may, just one other thing for example—

Senator Hennings. One thing interests me at this point. I happen to be chairman of the national penitentiaries committee.

Often detainers are placed against men in institutions, State or Federal, men under long sentences, and upon their release they are picked up and prosecuted again. I would assume that in the functioning of your office, as I understand your general philosophy, you would make that a discretionary matter.

Mr. Silver. As to prosecuting him again?

Senator Hennings. Yes.

Mr. Silver. Absolutely.

Senator Hennings. You would determine whether you wanted to pick him up at the gate of one institution from which he has been released for good conduct, maybe a little short of his regular time, but having served a substantial sentence, and haul him back for something he did 10 years ago or 20 years ago, and try him again.

Mr. Silver. As a matter of fact, now, Mr. Chairman—

Senator Hennings. It is bad when that thing is misused in our penal institutions. There are times, of course, when it should be used.

Mr. Silver. I will tell you another reason why it should be. When the man has a detainer lodged against him, he does not get such a thing as jail liberties and they are very important to a man that is detained.

Now, in New York State today, not only because of the decision of our court of appeals (*People* v. *Prosser*, 309 N. Y. 352), but a bill has been passed where a defendant in jail, where there is a detainer against him, may demand a disposition of that proceeding. If it is not disposed of within 180 days, it is automatically dismissed. (N. Y. Code Crim. Pro. sec. 669-a.)

The district attorneys backed that legislation so that we have no desire to just keep rubbing it on the fellow because

he happens to be in jail. People are not chocolate bars coming off a belt line. Each case must be examined separately.

I say in our desire to be fair, and I may be belaboring this point, but I wanted to make it clear, that the fact that you take one position on wiretapping and law enforcement has absolutely nothing to do and has no relationship with whether you are interested in civil liberties and in defending the Bill of Rights under our Constitution.

In the same report of the work of my office, I had a little paragraph here which I called my chats with the grand jury. It reads:

Whatever our occupation or profession, it is important always to keep in mind that we are all engaged in a fight to preserve our democratic principles.

The institution of the grand jury is a piece of machinery that took 800 years to establish and is more important today than it ever was.

Your district attorney makes it a point to talk to each of the grand juries when it is empaneled. I try to convey to them their importance in our system of justice. I make it clear to them that they are not the court's or the district attorney's grand jury. Indeed, that they are there to protect the citizenry from the possible tyranny of the district attorney; that an indictment found against a person, whatever may subsequently happen to the case, is of the most serious consequence to the defendant, and that often the indictment is all that his fellow citizens may remember, even forgetting an acquittal if it should occur. They are cautioned to find an indictment only in credible, legal evidence.

It is not enough for us to believe in democracy. Belief is of no value if it is not followed by practice. The district attorney must be ever alert and zealous in carrying out

his duties, but he, too, must be careful not to thwart our hard fought democratic procedures. The end does not justify the means unless it conforms strictly to the law which expresses the will of the people.

Senator Hennings. Very good.

Mr. Silver. I think I have said enough about the fact that we love law and we love civil rights and we want to be decent citizens and we recognize our duties as such.

Now, I want you to know, too, that the district attorneys have been against giving anybody the right—district attorney, attorney general, or anybody else—the right to use wiretapping in furtherance of crime detection without a court order.

This goes back to May 6, 1954, when my law partner, who was testifying before some committee, either House or Senate, wanted my views on it. I put it in writing.

I said I understand the Attorney General does not favor a provision in the proposed bill—there was some bill before the Senate requiring a court order based on showing of reasonable cause authorizing the tap.

I wrote him in part:

As a district attorney in the second largest county in the country, I resort quite frequently to wiretapping in our fight against crime. Under the statutes I am required to get a court order, and I welcome it as a reasonable restraint.

"Power is a heady thing," as Mr. Justice Jackson said, and just preceding that wise observation, he remarked, "So that an objective mind might weigh the need, the right of privacy was deemed too precious to trust to the discretion of those whose job is the detection of crime and the arrest of criminals."

Testimony of Hon. Edward S. Silver Before Senate Subcommittee on Constitutional Rights of Committee on the Judiciary

I don't want to burden the record. I'll just leave this letter with you, and you can put it in the record.

Senator Hennings. Thank you, Mr. Silver. Without objection the letter will be received and made a part of the record.

(The letter referred to follows:)

May 6, 1954.

Nahum A. Bernstein, Esq.,
New York, N. Y.

Dear Nahum: I thought it would be best to put in writing some of my thoughts expressed to you in connection with your appearance before Senator Wiley's committee that is considering wiretapping legislation.

I understand that the Attorney General does not favor a provision in the proposed bill requiring a court order, based on a showing of reasonable cause, authorizing the tap. As the district attorney in the second largest county in the country, I resort quite frequently to wiretapping in our fight against crime. Under our State statute, I am required to get a court order and I welcome it as a reasonable restraint.

"Power is a heady thing," as Mr. Justice Jackson said (*McDonald* v. *United States*, 335 U. S. 451, 455-456 (1948)), and just preceding that wise observation he remarked "so that an objective mind might weigh the need • • • that right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals."

If it should be argued that the procurement of an order would be a delaying factor in proceeding with the business at hand, I can tell you that getting the order is a simple matter and can be gotten in a few hours, or less, if the situation should require it.

Indeed, the mechanics in setting the tap is far more difficult and time consuming. Locating the "pairs" and the

installation of the tap are not too time consuming, but getting the proper "plant" (listening post) is not an easy thing and at times has taken us days and even a week and more to set. The greatest care must be exercised in the establishment of the "plant" or the whole operation will blow up in short order.

The ordinary citizen is too worried or frightened that he might get involved if he provided the place for a "plant." Even where he is not, the coming and going of men quickly creates suspicions of neighbors and even the police who are not part of the operation. This difficulty varies with the location of the wire to be tapped. It is easier in business areas and the difficulty increases as the area is more sparsely settled.

Indeed, when we think we desire to tap a wire, we can have the order and affidavit ready long before we have our setting in order. We have never found the necessity to get an order an obstacle.

As a district attorney, I must not forget that at times in the zealousness to solve a crime I might be tempted to thrust aside protective procedures that have come down to us as a result of many hard-fought battles. Four centuries ago Lord Coke (Second Institutes (1656) 48) said:

"Every oppression against law, by colour of any usurped authority, is a kinde of destruction * * * and it is the worst oppression that is done by the colour of justice."

I want to say that I strongly favor the Attorney General having the power to tap wires in his fight against subversives. We must get the modern tools to fight those who use the modern tools for their nefarious purposes. Yet with this necessary power should go the objective view of the court in granting an order permitting a tap.

Sincerely,

EDWARD S. SILVER.

Testimony of Hon. Edward S. Silver Before Senate Subcommittee on Constitutional Rights of Committee on the Judiciary

Mr. Silver. Four centuries ago, Lord Coke said:

Every oppression against law, by color of any usurped authority, is a kind of destruction * * * and it is the worst oppression that is done by the color of justice.

Senator Hennings. Do you think, Mr. Silver, wiretapping practices would be improved if only district attorneys could obtain court orders?

Mr. Silver. Well, I think the district attorney, without being offensive to any other law-enforcing groups, I think he is more conscious of his obligation than perhaps, maybe, a police officer might be, if not of a high rank. I am sure that our own police commissioner himself, who happens to be a lawyer, Commissioner Kennedy, probably feels much the way I do about it.

My friend, Sam Dash here, has given you some figures about 13,000 or 21,000 unlawful wiretaps which are all built up and multiplied by the number of pen—I think he called it—pen recorders, which is an apparatus which we have for getting the number d:.n of somebody while he is dialing when you have a tap on his wire.

When I read Mr. Justice Douglas' statement about 58,000 tap orders being procured in New York City in 1 year (1952), I really became quite disturbed. In the first place, if you thought about it for a moment, if you had 58,000 tap orders in 1 year, with every plant having to be covered by eight men, there wouldn't be a New York policeman on the street. We have only got about 24,000, and we would have to get the Marines and Navy out to man the.e wires. It is an impossibility. I made a careful check of the number of orders procured and the fact showed only 480 orders were

gotten by all five district attorneys and the police department.

I am looking forward to seeing Sam's book, and I let the police commissioner of our city answer the estimate of 13,000 to 21,000 unlawful wiretaps by police officers. I only wanted to say for the record that I express a very, very serious doubt as to the accuracy of a figure built up by the number of pen registers that happen to exist in the police department. At best one must be very wary of statistics—but when built on a fanciful premise they have no validity at all.

Now, there is a tremendous amount of fanciful and imaginary fears that have been trumped up in the minds of a lot of people about what is going to happen if we let law-enforcing agencies under proper restraints of court order tap wires. Permit me to address myself to that situation.

As I said before, nobody can be more zealous than district attorneys for the most stringent laws for private people who tap wires. We would say, make even the possession of such equipment unlawful, so we wouldn't have the difficulty we now have of having to try to convict a man beyond a reasonable doubt.

I know we district attorneys don't enjoy the luxury that the Senate committees have. A Senate committee puts a man on the stand and if he says I take the fifth amendment, they have won a case, they have convicted. When we get a man—

Senator Hennings. Let's say "some Senate committees," if you don't mind. Some Senate committees seem to think that the fifth amendment isn't part of the Constitution.

Mr. Silver. When we get a man who refuses to testify, we have nothing. We have to go out and get the evidence.

Senator Hennings. Some Senate committees, Mr. Silver, act as though they have never heard of law or of the Constitution or the Bill of Rights, and they talk about taking the fifth amendment as though people have no right to take it. Why don't some of these worthies offer a resolution to amend the Constitution to take the fifth amendment out? I have often wondered, if they think it is so bad, why not try to take it out and then they won't have to—

Mr. Silver. My silence is only as a result of my not being here to talk about what any other Senate committees may be doing. I am not expressing myself one way or the other.

Senator Hennings. I mentioned no special Senate committee.

Mr. Silver. As I said before, there is an awful lot of fanciful and imaginary fears trumped up of what is going to happen to our country if we permit a lawful wiretap.

Why worry about speculation when we have the laboratory of the largest State in the Union. We have 62 counties and some 16 million people; we have been permitted to use this instrument to fight crime for 20 years.

When the Savarese committee came into being, they sent out a questionnaire to every district attorney, a detailed questionnaire. I got a copy of that questionnaire and I sent it out that the 54, it figures here, if you want them, 54 orders may have covered maybe 70 or 80 telephones. Sometimes when we get an order, take a criminal group, are working out of a switchboard, we may get an order covering every one of those phones, but actually only tapping one wire of

the 32. So that we will have it accurately, let me give you the number of orders we procured during certain years and the number of phones it covered.

(The information is as follows:)

Year	Number of orders	Number of phones
1951	67	85
1952	54	68
1953	33	41
1954	60	96
1955	59	72
1956	30	59
1957	39	108

Mr. Silver. If the fellow we are after is in a particular place, you can't possibly—it is difficult to tap a switchboard where there are 32 wires. We don't have the equipment to do it, nor do we have the men to do it.

Mr. Slayman. That covers all people who use those phones, even if criminals are using them only 10 percent of the time?

Mr. Silver. When we get an order, we get an order for a wire, not for only a particular person speaking from that wire. We couldn't possibly delineate it in that form. Let me suggest a question you might wish to ask me. "Mr. Silver, do you also tap on occasion public telephones?" My answer is "Yes." If we are after criminals whom we ascertain are using a public telephone in their operation, we will get a court order to tap that public phone. We would hear all conversations on that phone. The record shows that we have kept our interest only on the criminals. We have never abused that right. The record also shows, and

the Savarese committee said so in its report, that in 20 years they have never, had one instance where the district attorney has abused this privilege. It is just a sentence or two on page 17 of their report of March 1957.

It says:

We know of no instance in which illegal wiretap evidence has been offered by any prosecutors since law enforcement wiretapping was regularized in 1938.

In other places in this report, there has never been the slightest suggestion that district attorneys have ever abused this right which we use for law enforcement nor did the Savarese committee suggest that the right should be curtailed.

Now, actually, I think it ought to be said and made clear that this is not a right or power that the district attorney has. I have this right as a trustee for 3 million people that I have to represent in fighting crime. If, for any reason, the Senate or the Congress doesn't do something to correct the *Benanti* decision, we just will not be able to use wiretapping in our law enforcement, and it simply means that a lot of people are going to have carte blanche in their criminal operations. You will not be depriving me but the people who elected me to fight crime in our county. If I am compelled to hunt lions with a peashooter, so be it. I think the Congress has a serious responsibility in this matter.

Senator Carroll. May I interrupt?

Following Senator Hennings' question to you, your 1954 orders were orders given to the district attorney, is that correct?

Mr. Silver. That's correct.

Senator Carroll. Does it cover police orders?

Mr. Silver. It does not. The police orders, Senator, have their own legal bureau and they may procure court orders on their own.

Senator Carroll. Then in your district attorney's office you have independent investigators and you do your own law enforcement, do you?

Mr. Silver. We have some investigators in our office. There are district attorneys' offices, as was indicated before when Mr. Dash was testifying where the district attorneys merely prosecute the evidence that the police bring them. In my office and in Mr. Hogan's office and in the five counties in my city, and in others throughout our State, we go out and investigate situations ourselves. We do not wait until the police department brings it in to us because there are many situations where the police are so busy with the ordinary current crimes of violence that they don't have the time to look into, as for example, into certain phases of labor racketeering. For example, 2 years ago there was an outfit, under the guise of running a labor paper, which collected almost a quarter of a million dollars in 6 months from business people on the theory that they were getting the money for a labor paper. We convicted those people but it took us months of investigating. I am sorry I didn't bring the record of one of the conversations which we recorded so you could listen to it properly because I have permission from the man whose wire we tapped saying you can use it for anything you wish.

We never could have convicted those labor racketeers if we didn't have the use of wiretapping.

Senator Carroll. I just wanted the record to show that you have the power to initiate investigation.

Mr. Silver. Right.

Senator Carroll. That you may apply for court orders. I assume you have the power to arrest.

Mr. Silver. Well, we have the power to arrest because we have men assigned to us by the police commissioner. I have approximately 70 policemen assigned to my office by the police commissioner who can go out and make an arrest. While technically they are under the command of the police commissioner, for all intents and purposes he lets me actually be the boss of those men.

Senator Hennings. I think that is true in most cities. When I was a prosecuting attorney, I always had investigators and a police detail attached to my office. They didn't go out and make cases. They went out, followed up leads, and went to interview some of the witnesses from whom the police, perhaps, had not sufficiently obtained all the facts we needed.

Mr. Silver. You asked before about the number of orders. For example, for those figures I gave you for the years 1951 through 1954, there were 214 orders covering 290 wires.

Senator Carroll. There is a time limitation on those orders, too; is that correct?

Mr. Silver. Yes; it used to be 6 months. It has been amended to 2 months. You can go back to the court and on showing get an extension of the order if you need it.

In other words, you have to come back to the court and report to him that you feel you are justified in getting an extension. If the court is satisfied, you may get an extension.

You would, if you would like to get an extension, you submit another order extending that order for another 2 months, but no more than 2 months at a time. Generally, you know within 2 months whether an order is good or not.

Sam Dash has testified about the fact that you take a sample of the wire and see if it is "hot" and then you get your order. I can only say that that does not happen in my office. I am not going to say what the police do though I doubt it, because I have not checked into that, but in my office we don't know whether a wire is going to be profitable or not. We only get a court order when we have sufficient independent evidence on which I can say that I have reasonable grounds to believe that we will get evidence of crime.

I may say for the record that if we get an anonymous letter—it can be in the greatest detail—under no circumstances will we apply for a court order on an anonymous letter. We never know who is going to write about whom and try to annoy somebody, so we have an office rule—and I am sure it applies to other district attorneys—we just will not apply for a court order if it is only based on an anonymous note.

We first go out and investigate, and if we get enough substantial evidence—and many anonymous letters are very valuable—we can then, if we wish, get a court order.

We don't get them all the time.

If we average one a week, we are doing all right. We don't run around doing that. We don't have the men. We don't have the equipment to do it.

We do it only when we think it is important.

Senator Carroll. When you apply for a court order, you do so in chambers?

Mr. Silver. That's right.

Senator Carroll. Is this testimony taken at that time for the record?

Mr. Silver. Not for the record, but the judge may ask such questions as he desires either from the police officers or investigators, or the assistant who goes with the police officer because we hesitate to put in—

Senator Carroll. Do you make a showing by a written affidavit; or how do you make a showing? What is there in the nature of a record that is made?

Mr. Silver. It is a written affidavit which in itself must show the district attorney has reasonable grounds to believe he can get evidence of crime by a tap. He states facts in it that show to the court that he has reasonable grounds to believe that if you tapped this man's wire, we have reasonable grounds to believe we will get evidence of criminal activity. That is in the affidavit. It must be within the affidavit.

The judge may still, if he desires, make further inquiries to satisfy himself that our request is proper.

The reason we don't like to have it down on the record is that if the judge wants to know where we are getting our information, we don't want that on the record—not that we are worrying—we have never had an example where a judge has, to use a colloquialism, burned our wire up—but we don't like to put that information in because people will hesitate to give us information if their names are going to appear in affidavits or in typed records.

So we cite information given to us by an informant although we don't give the name.

If the judge wants to know more details, we will be glad to give it to him, including the name of the informant.

As I said, again, when you talk about these imaginary ills, I think this is going to be interesting to this committee—

Senator Carroll. This is based on the affidavit itself.

Mr. Silver: On the affidavit and such other evidence as the judge may want to satisfy himself before he signs the order.

We submitted to the Savarese committee sample affidavits on which we procured our order. It is very much the same as when you get an application for a search warrant. It is the same type of affidavit. You must show reasonably necessity,

Even under that situation the judge may say, "Tell me a little bit more about it before I sign the order."

Senator Carroll. The police follow the same system because this is provided for by State law.

Mr. Silver. They are under the same act. They have to operate under the same order we do. The imaginary things that people dream up, that all liberties are going to be destroyed if we let anybody tap wires—I can't give you all, but it would be very interesting if you people would read the debates on the very Constitution which we are concerned with now, when it was considered for adoption.

You get a fellow like Patrick Henry who, everybody admits, was a great patriot, and he said, in connection with the Constitution "I would rather infinitely have a king, lords and common, than a government so replete with such

insupportable edicts." He is talking about the Constitution we are now worried about, There are many others—I don't want to burden the record—many great patriots worried, and I think justly were worried about what things may happen. But I give you this as a sort of a warning that any time there is something new, people with imaginations will come up and say, "My heavens, if we give the law-enforcing agencies the right to tap wires, we will all just go to pieces." But the record of 20 years of operation under that clearly proves that that is not true.

On the other hand, you see, as Mr. Dash testified, when you get in areas like California, where they have no statutes as we do in New York, where we are restricted under law, and are very careful not to abuse the right to get the orders, the law-enforcing agencies get private people, to tap wires. There is no control and nobody knows what is going on, which is really a chaotic state and really may lead to tyranny rather than where the thing is properly controlled under the law as in my State.

For example, one of our leading newspapers in New York every once in a while would write an editorial about this "dirty business" of wiretapping.

I called up the editor of the New York Times. I said, do you know the facts? Do you know what the situation is; how important it is to law enforcement?

I went and spent a couple of hours with one of their editors and I am glad to say that they published an editorial soon thereafter in which they said wiretapping is a dirty business, but so is narcotics and so is murder and labor racketeering. In this modern world it doesn't make sense to say to the district attorney, "You keep on with your

horse-and-buggy system; don't you use automobiles and modern devices." They realized that law-enforcement agencies must be given the modern tools to fight the type of criminals we meet up with today who use airplanes to transport narcotics, who use every method that is known to science to commit crime. I respectfully submit, to me it doesn't make sense to say to the district attorney: "No, you can't use modern devices to run down crime."

Now, this is something that has been close to me and I have woried about this a good deal, and district attorneys have, too, and some time ago I wrote an article—I am sorry I didn't bring it with me—I wrote an article for the Harvard Law Record.

(Following is the article by Mr. Silver:)

[Harvard Law Record, copyright 1958, Harvard Law School Record, Inc., Feb. 27, 1958]

LEGALIZED WIRETAPPING NECESSARY TO COMBAT STREAMLINED EFFICIENCY OF ORGANIZED CRIME

(By Edward S. Silver)

There is a great deal of fuzzy thinking about the "dirty business" of wiretapping that sorely needs clarification. Laymen, as well as lawyers, feel a lift when they throw the cloak of Justices Holmes and Brandeis about them, and brand wiretapping as "dirty business." When they do so it is obvious that they did not read the *Olmstead* case (277 U. S. 438 (1928)).

The *Olmstead* case involved illegal wiretapping by Federal prohibition agents in the State of Washington, where wiretapping was declared to be a crime by a specific statute. What both great judges said was that law-enforcing agents should not be permitted to violate the laws even if it suc-

ceeds in convicting criminals. This is what Mr. Justice Holmes said (p. 469), "* * * I think, as Mr. Justice Brandeis says, that, apart from the Constitution, the Government ought not to use evidence obtained, and *only obtainable, by a criminal act* * * *."

Later, again governed by his distaste for evidence procured by law officers while violating a specific statute, he said (p. 471), "But if we are to confine ourselves to precedent and logic, the reason for excluding evidence obtained by violating the Constitution seems to me logically to lead to excluding evidence *obtained by crime of the officers of the law.*"

Understanding now the clear and only basis for Justice Holmes' dissent, we can put the words "dirty business" in the correct light. I quote the Justice (p. 470), "For those who agree with me, no distinction can be taken between the Government as prosecutor and the Government as judge. *If the existing code does not permit* district attorneys to have a hand in such dirty business, it does not permit the judge to allow such iniquities to succeed."

There are those who like to consider themeselves as "liberals," whatever that word really means. There is a feeling among those "liberals" that, to come within the aura of that term, they must be against wiretapping without thinking clearly on the question of whether the wiretapping is done according to law or, as in the *Olmstead* case, in violation of the law. Nor do they address themselves to whether wiretapping is or is not necessary in the present-day fight against crime. One can well cite Mr. Justice Brandeis in the *Olmstead* case at this point where he says (pp. 473-474) "But 'time works changes, brings into existence new conditions and purposes'."

I speak for the great majority of prosecutors, who are not only ardent advocates of civil rights, but do something about it.

Testimony of Hon. Edward S. Silver Before Senate Subcommittee on Constitutional Rights of Committee on the Judiciary

It is very important to point out that the wiretapping controversy is not between those who cherish civil liberties and those who are indifferent to them. Indeed the record shows that the district attorneys are alert to protect civil rights, indeed the civil rights of those who are charged with crime. It is they who are generally in greatest need of that protection.

Let me list some bills which the New York District Attorneys' Association, *not* bar association or civil liberties group, advocated and introduced in the New York State Legislature to protect the rights of defendants:

1. Legislation to provide (at the cost of the State, on a court order) indigent persons with daily copy of testimony and the cost of expert witnesses, when needed, in preparation of their defense;

2. Legislation to provide, in crimes where a second offense makes it a felony, a procedure that the prior conviction is not disclosed to the jury. (As the law is now, it is contained in the indictment and read to the jury, and we consider it unfair to the defendant);

3. Legislation to provide that, where a judgment of conviction is vacated and a sentence is thereafter imposed for a lesser term than the original sentence, any time spent by the person under the original sentence be credited to the term of any other sentence which the defendant may currently be serving. (This is not the law now);

4. Legislation making it a crime for one who fails to appear in court when the defendant is paroled in his own custody or in that of his attorney. (Such a law would enable the district attorney to parole such persons and thus not put them to the cost of procuring bail bonds for their freedom pending trial.)

It should be made clear, too, that district attorneys are not in favor of granting any law-enforcing agency the right to tap wires without a court order.

Testimony of Hon. Edward S. Silver Before Senate Subcommittee on Constitutional Rights of Committee on the Judiciary

TESTIMONY

On April 19, 1955, I testified before the Judiciary Committee of the House of Representatives. (See hearings before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 84th Cong., p. 97, etc.) In 1954, in a letter to a Senate committee looking into the wiretapping problem, I wrote to the same effect. I quote the parts dealing with our attitude not to permit wiretapping without a court order:

"I understand that the Attorney General does not favor a provision in the proposed bill requiring a court order, based on a showing of reasonable cause, authorizing the tap. As the district attorney in the second-largest county in the country I resort quite frequently (about 40 to 50 times a year) to wiretapping in our fight against crime. Under our State statute, I am required to get a court order and I welcome it as a reasonable restraint.

"Power is a heady thing, as Mr. Justice Jackson said in *McDonald* v. *United States* (335 U. S. 451, 455-456 (1948)). Just preceding that wise observation, he remarked, 'So that an objective mind might weigh the need * * * the right of privacy was deemed too precious to entrust to the detection of crime and the arrest of criminals.'

"Indeed, when we think we desire to tap a wire we can have the order and affidavit ready long before we have our setting in order. We have never found the necessity to get an order an obstacle.

"As a district attorney, I must not forget that at times in the zealousness to solve a crime I might be tempted to thrust aside protective procedures that have come down to us as a result of many hard fought battles. Four centuries ago Lord Coke (*Second Institutes* (1656) 48) said:

"'Every oppression against law, by colour of any usurped authority is a kinde of destruction * * * and it is the worst oppression that is done by the colour of justice.'

Testimony of Hon. Edward S. Silver Before Senate Subcommittee on Constitutional Rights, of Committee on the Judiciary

"I want to say that I strongly favor the Attorney General having the power to tap wires in his fight against subversives. We must get the modern tools to fight those who use the modern tools for their nefarious purposes. Yet, with the necessary power should go the objective view of the court in granting an order permitting a tap."

At this point it might be well to state, too, that the district attorneys in New York State advocated and wrote the law passed by the New York State Legislature in the 1957 session making it a felony punishable by not more than 2 years for any law enforcing agent to tap a wire without a court order. (See New York Code of Criminal Procedure, sec. 813-b.)

ENACTMENTS

Let me quote the New York State constitution provisions and pertinent part of the enabling statute which permits wiretapping by court order:

"*New York State Constitution, Article 1, Section 12*

* * * The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof. Adopted by constitutional convention of 1938; approved by the people November 8, 1938.

"*Code of Criminal Procedure, Section 813a*

"An ex parte order for the interception, overhearing or recording of telegraphic or telephonic communications may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York, upon oath or affirmation of a district

attorney, or of the attorney general or of an officer above the rank of sergeant of any police department of the State or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained and identifying the particular telephone number or telegraph line and particularly describing the person or persons whose communications are to be intercepted, overheard or recorded, and the purpose thereof. In connection with the issuance of such an order the justice or judge may examine, on oath, the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based shall be delivered to and retained by the applicant as authority for intercepting, overhearing or recording, or directing the interception of the telegraphic or telephonic communications transmitted over the instrument or instruments described. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same" (added L., 1942, c. 924, effective May 23, 1942; as amended L. 1957, c. 879, Sec. 1. eff. July 1, 1957).

There is a great deal of careless comment on the evils of wiretapping. One of the most glaring examples is a statement appearing in a book entitled "An Almanac of Liberty" by Mr. Justice Douglas of the U. S. Supreme Court, I quote from page 355 of this book:

"During 1952, there were in New York City alone at least 58,000 orders issued which allowed wiretapping—over 150 a day every day in the year. The New York system has in

practice been oppressive; it has been used as the means whereby police have obtained guarded confidences of people and used the information for corrupt purposes."

What were the facts? In 1952 all 5 district attorneys in New York City and the police department procured a total of 480 orders—less than 1 percent of what Mr. Justice Douglas asserted. Here is the breakdown:

New York County	60
Kings County	54
Bronx County	14
Queens County	12
Richmond County	2
New York Police Department	338
Total	480

While we are on statistics, may I say that in connection with an inquiry made by a committee of the New York State Legislature figures were gathered on the number of wiretap orders procured by all the district attorneys in the State of New York. Sixty-one of sixty-two counties reported for the 5-year period, 1950 through 1954. These counties account for a population of 14,590,806 (total population, 1950 census, is 14,830,192). For the 5 years the total number of wiretap orders procured was 2,394, or an average of 479 a year, for 61 district attorneys covering a population of over 14½ million people.

Prudence Displayed

Surely it can be said that this power is used with care and restraint.

There are those who, with vivid imagination conjure up dire consequences that will result from the power to tap wires with a court order. Twenty years of experience in New York State show that facts are more reliable than fiction.

Testimony of Hon. Edward S. Silver Before Senate Subcommittee on Constitutional Rights of Committee on the Judiciary

It is most interesting and in a sense amusing when one reads in the year 1958 the debates by the Delegates on our Constitution in 1787. They put one in mind of those who now beat their own breasts and issue dark prophecies about our liberties if wiretapping by court order were permitted.

Patrick Henry is often quoted, approvingly, for "Give me liberty or give me death," but listen to him as a Delegate from Virginia oppose the Constitution: "I would rather infinitely have a king, lords, and commons, than a government so replete with such insupportable edicts."

A Delaware Delegate said: "We are told that although 3 large States form a majority of the people of the 13, yet these 3 States will never do harm to the rest of the States. Gentlemen, I do not believe you."

Why do we need this right to tap wires with court order? Simply, to fight crime—modern crime—organized crime. Where is the sense or logic to say that those engaged in crime may use the telephone in furtherance of their iniquitous operations, and they do, without let or interference?

Federal judge and former Secretary of War, Robert P. Patterson, speaking on the subject of organized crime before the American Bar Association on September 19, 1951, put it well when he said, in part:

"The underworld of today would rate Jesse James as a small-fry amateur. Crime has become big business, with campaigns planned and organized like operations in legitimate big business, with a structure of chief executives, fiscal departments, legal departments, public relations, and the rest. Advantage has been taken of the most modern methods in business organization, *swift communications*, swift transportation. Advantage has also been taken of lagging organization of government. Law enforcement systems operating along lines good enough for 1851 or 1901 are too slow for the swifter pace of the times we are living in."

Further, in the same address, he said:

"In my opinion there is pressing need also for Congress to legalize the interception of telephone communications—wiretapping if you will—by Federal enforcement officers. Federal officers, as matters stand now, have no such power and evidence so obtained is not admissible in the Federal courts. Their present inability is a crowning mercy to professional lawbreakers. If we are in dead earnest in insisting that organized crime be defeated, we should lose no time in putting this powerful weapon into the hands of the officers we depend on to do the necessary work. *Experience in the States where interception of telephone talks by law officers is allowed proves that the liberties of decent citizens have been in no way interfered with or injured.*"

What must be understood and understood most clearly is that this is a right not given to the district attorneys, but rather to the people, and that the district attorneys are their agents who have sworn to carry out their obligation to the people.

Wiretapping a Necessity

All the district attorneys of New York State, and all district attorneys that I have come in contact with in the national association, feel most strongly that wiretapping is absolutely necessary if they are to be able to cope with the modern criminal.

Does the public wish this right taken from its servants in this fight against crime? We believe it does not.

On December 9, 1957, the Supreme Court in *Benanti* v. *United States* (355 U.S. 96), though strictly speaking obiter, declared that even in a State like New York, the interception and divulgence of a telephone communication is a violation of section 605 of the Federal Communications Act (1934). This decision is considered a serious blow to law enforcement, particularly in the fight against organized crime.

Testimony of Hon. Edward S. Silver Before Senate Subcommittee on Constitutional Rights of Committee on the Judiciary

There has now been introduced in the U.S. Senate a bill (S. 3013) to amend section 605 to authorize certain communications to be intercepted in compliance with State law and for other purposes, which would except from the operation of section 605, FCA, district attorneys and law enforcing agencies that operate under statutes permitting wiretapping by court order, " * * * if such interception was made after determination by a court of such State that probable cause existed for belief that such interception might disclose evidence of the commission of a crime." It is hoped Congress will understand the importanee and urgency of this bill and move it to a successful passage with all speed.

McClellan Bill

The sponsors of this bill were Senators McClellan, Ives, Ervin, Mundt, Goldwater, and Curtis. In a statement on the floor of the Senate, Senator McClellan in behalf of the bill and his sponsoring colleagues said in part:

"As chairman of the Senate select committee investigating into improper activities in the field of labor and management, and as a member of the Judiciary Committee, I am cognizant of the problems facing prosecutors and enforcement agencies in their conscientious efforts to eliminate crime and to punish the criminals, particularly the organized criminal syndicate rings engaged in widespread criminal rackets, such as labor racketeering, narcotics, bribery, and extortion rings.

"The detection, investigation, and prosecution of crime, particularly organized crime, will be seriously handicapped and weakened. In many cases prosecution and investigation of crimes would be completely thwarted and would collapse were wiretapping to be denied to the law enforcement agencies.

" * * * Congress has never intended to permit the criminal to use the means of modern communication with im-

punity by enjoining law-enforcement agencies from intercepting his communications. To accept such interpretation would mean that Congress intended to give criminals free license and encouragement to use communications without fear or handicap and * * * grant these criminals a 'privileged sanctuary.'

"* * * in the field of criminal detection and prosecution, the law-enforcement agencies are consfantly waging a war against criminals who attack society. To do so effectively, it is necessary and essential to intercept their communications.

"Many States, such as New York State, have enacted laws to enable their enforcement agencies to intercept communications under proper safeguards and to eliminate the dangers of promiscuous and improper use. In New York, for example, the enforcement agencies must apply to the court of highest original jurisdction for a warrant to permit the interceptions. This warrant is only granted when the court is satisfied that reasonable grounds exist that evidence of crimes will be obtained as a result of the wiretap."

* * * * *

Mr. Silver. I say very quietly I went to Harvard Law School. I am, although I am not a Harvard man, I went to City College because I couldn't afford to go to Harvard College—

Senator Hennings. Why do you say "quietly"? Why say it quietly if you went to Harvard Law School? Don't you think people learn any law there?

Mr. Silver. In Harvard? I think that Harvard is the finest law school in the country.

Senator Hennings. I think some people think it is almost as great as a great many others.

Mr. Silver. I am sure there must be one in the State of Missouri that is as equally as good.

Senator Hennings. I think there is more in any law school than any student can learn.

Mr. Silver. I didn't get the question.

Senator Hennings. There is more education in the law available in any law school, accredited law school, than any student can take.

Mr. Silver. I think that's correct.

Senator Hennings. You don't begin to learn much about law until you get out of law school. By the time a lawyer is ready to be taken to his eternal reward, if any, he is still learning about the law.

Mr. Silver. If a man gets to be a U. S. Senator or a district attorney—

Senator Hennings. He never really—

Mr. Silver. He has a chance to pick up some ideas.

Now, this little piece which I wrote for the New York State district attorney's paper, while it is written in a sort of—

Senator Hennings. Did you study under "Bull" Warren or Sammy Williston?

Mr. Silver. I studied criminal law with "Bull" Warren.

People just don't understand what is going to happen if the Congress does not correct the effect of the *Benanti* case.

Organized crime will have a field day.

The least that Congress should do is to amend section 605 of the Federal Communications Act to the effect that it will not be unlawful for law enforcing agencies to tap wires in States like New York State which requires a court order on a sworn statement of reasonableness.

• • • • •

Let me read this little column I wrote about what the effect of the decision will be in law enforcement. This is an imaginary piece, but I think it states the law. It is a telephone conversation between a top racketeer and one of his henchmen. I call the henchman Peanuts and the other is the Boss, so you will know who the characters are in this play:

It is not written like a decision but it sets forth the law.

Peanuts. Lo, Boss, this ez Peanuts.

The Boss. Yeah, hello, did the shipment come in OK?

Peanuts. Sure thing, Boss, 50 horse.

The Boss. What do you mean "50 horse"? I was expecting 50 kilos of heroin. Give it to me straight.

Peanuts. Gee, Boss, dats no way to tak on the phone, you warned me y'self. I • • •

The Boss. Listen, dope, that's old stuff. My mouthpiece told me the bulls aren't allowed to stick their snoots in our private business. It's against the law, y'hear? It's dirty business to do such a thing.

Peanuts. Are you all right, Boss? You ain't cockeyed or something? Are you hittin' the stuff y'self?

The Boss. Look, dope, I'm telling ya. Let 'em listen. The lip tells me and he gets paid to know. The more they listen, the better. It's better'n you think.

Senator Hennings. That means lawyer, sometimes called a shyster or lip.

Mr. Silver. That's right. I thought everybody knew what a lip was.

Senator Hennings. They haven't been where you and I have been.

Mr. Silver (continuing):

It's better'n you think. There's some stuff known like the fruit of the poisoned bush, or something. If they grab the stuff after lis'nen, it's out. They ain' allowed to do such naughty things no more.

Peanuts. Look, Boss, should I come over? I think yuh needs me.

The Boss. Forget it, Peanuts. I'm fine, great—the boys is all with me—forget it—and say—you get another grand for the job you did yesterday. The D.A. will know his canaries can't eat lead—it's bad for their diet. Ha, ha, ha—that's pretty good, what?

Peanuts. OK, if ya says so, ya had me worried there for a bit . . .

The Boss. And listen, I want you should give a couple of yards to the Criminal Liberties Union. Deys the main outfit dat made tappin' a dirty business. Now we got a right to talk 'bout our private business, like good Americans should what the Constitution says they should.

Peanuts. Boss, dat's what I call a good union—is it one of Dio's outfits?

The Boss. I don't care what outfit it is—they earn our t'anks. Take care of it. Ain't you got no 'preciation? Bye, Peanuts, keep your nose clean.

Peanuts. Bye, Boss.

I may have been kidding when I wrote it, but actually that is the effect of the *Benanti* case. In other words, if we should, in violation of the law, listen to people dealing with narcotics or murder or anything else, we not only cannot use the testimony via the taps, but, as you know, the fruits of the poisonous vine as well, anything that develops from that may not be used. If it is shown in preliminary examinations, under the Supreme Court ruling, they have these voir dires when they cross-examine everybody as to was

there wiretapping and what did you learn and what did you find out—the law enforcing agency will just have to give up this very valuable instrument of detecting crime.

Now, one of the things I have heard people say: Isn't there a lot of wiretapping going on about gambling, as if gambling isn't very serious?

When we say gambling, I am not concerned with the fellows getting together in a room or shooting a game of craps, or playing gin rummy. We are talking about gambling in the sense that we prosecutors know it.

At the beginning of this year, in February, February 26, we have a grand jury in session which is looking into the gambling racket, it is called the rackets grand jury—they made a presentment in connection with gambling. The principal thing that we tried to do even though we have recommendations here as to other things, the principal thing that we try to bring home, and I am glad to say that many people have written to me for it, it is getting some slight circulation—I am not going to attempt even to read all of this—I will leave it for the record, but the basic point I wanted to make is this: The basic proposition is that gambling is the heart of organized crime and that is true on a national scale as well. May I quote just a paragraph here:

As brought out by the exposés of the Senate Rackets Committee during the period of May 10, 1950, to May 1, 1951: We have had considerable testimony from persons covering the national scene as well as the local scene; and we are convinced that a tieup between organized crime and gambling ventures is still the most significant fact in the national crime picture, that crime related to gambling and vice are still the seedbed of organized crime, and we consider it our duty, therefore, to call to the attention of this

honorable court the need for a greater public awareness of the deadly seriousness of crime relating to gambling and vice. If this presentment were to bring home not only to the people of this county but to the country at large the true nature of the enemy of society known as organized crime and the fact that it draws its heartblood from gambling, we shall have performed a real public service. We shall have struck a mighty blow at the very heart of the underworld.

Anybody who knows anything about this business knows that all the money, the principal moneys that go into narcotics, loansharking, so-called legitimate business, in competition with truly legitimate business, the money in Las Vegas to build those palatial places, come as a result of gambling, and gambling syndicates.

When people say, "Everybody gambles, it is a natural thing"—I know when we were in law school there was one professor who used to take his glasses off a number of times and we used to have a nickel pool to see who could get closest to the number of times he took his glasses off.

That is one thing. It is another thing to have cutthroats and guerillas controlling gambling over the country and get the money through which they carry on all their nefarious activities.

Senator Hennings. I think you are certainly right.

Mr. Silver. I would like to have this presentment made part of the record in the hope that we can get some legislation later based upon it.

Senator Hennings. Without objection, Mr. Silver's exhibit will be made part of the record.

(The presentment referred to follows:)

Testimony of Hon. Edward S. Silver Before Senate Subcommittee on Constitutional Rights of Committee on the Judiciary

PRESENTMENT OF THE SECOND ADDITIONAL MARCH 1958 GRAND JURY OF THE COUNTY OF KINGS ON EFFECTIVE MEANS OF COMBATING VIOLATIONS OF LAWS RELATING TO GAMBLING AND POLICE CORRUPTION

To Hon. Hyman Barshay, County Judge, Kings County

On April 28, 1958, this grand jury handed up an interim presentment to Your Honor summarizing the results of our probe to that date.

In that interim presentment we pointed out that some 40 witnesses, including bookmakers and police officers, had testified before us, and that evidence of corruption within the Brooklyn Borough plainclothes squad had been presented to us. Lacking some technical legal proof, we were unable, as a matter of law, to return indictments. In our interim presentment we recommended that this evidence be turned over to the police commissioner for appropriate departmental action. We concluded with the following statement:

"May we point out that the foregoing is but an interim report. Other phases of investigation into gambling and bookmaking in the county of Kings are currently being explored by this grand jury and we respectfully request the permission of this court at a future date to submit a further presentment relating to this phase of our inquiry."

Since that date, this grand jury has continued its investigation into various phases of the enforcement of the laws relating to gambling in the county of Kings. We have heard many additional witnesses, including high-ranking officers of the police department. In addition to our own able police commissioner, Stephen P. Kennedy, who appeared before this grand jury on two occasions, we had the benefit of the experiences and expert opinions of officials from large cities in other parts of our Nation. We heard testimony from police officers and detectives as to the methods of

combating crimes in our jurisdictions. We heard, too, considerable testimony on the subject of the interrelationship between crimes related to gambling on the one hand, and other criminal acts.

As a result of this investigation we have arrived at certain findings and desire to make specific recommendations to this Honorable Court.

The findings are these:

(1) Gambling is the Lifeblood of Organized Crime

Gambling is the very heartbeat of organized crime both on a local and national scale. Strangely enough, this vital finding, which should be apparent to everyone concerned with the problem of law enforcement, is recognized in theory but virtually ignored in practice. We emphasize that this most important finding was arrived at from an exhaustive study of this subject. It is a finding which should be proclaimed throughout the breadth and length of our country and the Nation. All of our other findings and recommendations flow from a proper understanding of this axiom of modern racketeering.

The crimes encompassed by the term "gambling" in this presentment are sinister. The public has been misled as to the true nature of gambling and its serious impact on our body politic, because it is confused with practices which are indulged in at one time or another by a large proportion of the respectable citizens of the community. Almost everyone, at one time or another, has gambled, whether in a private game of cards, at a church bingo, at the parimutuel machines at a racetrack or in some other form. The result has been a public acceptance of gambling as if it were a part of human nature and, therefore, an unimportant offense. This attitude is, in large measure, responsible for the public apathy toward the enforcement of the laws relating to gambling. The public must begin to understand

the crucial difference between criminals engaged in gambling and the indulgence of decent citizens in various types of betting.

From the evidence presented to us, we state categorically that gambling crimes are linked on innumerable occasions with the most obnoxious criminal enterprises known to man. The public may think of the bookmaker in the corner candy store as an innocent betting commissioner operating a legitimate business. We have heard the evidence. We know otherwise. Actually, if you scratch the professional operator of gambling ventures you find the narcotics peddler, the loan shark, the dice game operator, the white slaver, the murderer. Brooklyn has been the scene of a number of unsolved gangland homicides over the past few years. Almost every one of those killings is involved with gambling ventures in one form or another.

In one case where seven leading narcotics dealers were convicted in Kings County last year, six were actively engaged in gambling activities, including bookmaking and policy, which they used as the source of funds for their deadly trade in narcotics. We have heard considerable evidence which indicates that many of these gambling figures have gone into labor rackets and coin-operated machine rackets as well. The very case which was the initial subject of our investigation, involving two men who centered their bookmaking activities at a tavern known as Hugh Casey's Bar & Grill at 600 Flatbush Avenue, in the county of Kings, is an excellent example of the interrelationship of gambling and other criminal ventures. Closely allied with the bookmakers and operating out of the same tavern was a group of loan sharks who financed the bookmakers. These loan sharks also operated dice games. Literally thousands of sets of crooked dice were confiscated in raids upon their homes. Guns were found in or about the dwellings of these loan sharks. Legally intercepted telephone

conversations at the same tavern during the same period showed references to a holdup of a payroll truck in the county of Kings and to a burglary of many thousands of dollars' worth of transistor radios from a Long Island City factory. Evidence showed that those same bookmakers, through the loan sharks, were dealing with the notorious Robillatto, also known as "Johnny Roberts," who was the victim of a recent gangland homicide on Utica Avenue and Kings Highway.

In other homicides, as yet unsolved, the authorities have some evidence from informers and underworld leaks that those homicides, too, were intimately related to organized gambling. Valerino, whose body was picked out of the Narrows, was put to death, according to reliable information, because he held up a dice game without the permission of the "syndicate" boss. The recent gangland convention at Apalachin near the city of Binghamton in the State of New York points out the importance of gambling to the underworld since the overwhelming majority of the conferees at Apalachin have histories of violations of gambling laws and involvement with gambling operations.

The basic proposition that gambling is the heart of organized crime is true on a national scale as well, as brought out by the exposés of the Senate Rackets Committee during the period from May 10, 1950, to May 1, 1951.

We have heard considerable testimony from persons with information covering the national scene as well as the local scene. We are convinced that the tieup between organized crime and gambling ventures is still the most significant fact in the national crime picture; that crimes related to gambling and vice are still the seedbed of organized crime.

We consider it our duty, therefore, to call to the attention of this honorable court the need for a greater public awareness of the deadly seriousness of crimes relating to gambling and vice. If this presentment were to bring home,

not only to the people of this county but to the country at large, the true nature of the enemy of society known as organized crime and the fact that it draws its heartblood from gambling, we shall have performed a real public service. We shall have struck a mighty blow at the very heart of the underworld.

(2) Gambling Crimes Breed Corruption and Contempt For Law Enforcement

It is understandable from the first finding discussed above why official corruption is present most often in connection with the enforcement of the laws relating to gambling and vice than in any other area. This is true because of the vast profits derived from these enterprises and because of the continuing nature of the crime.

Repeatedly, going back over many decades, exposes of police corruption, not only in this country but in cities throughout the United States, show that the overwhelming majority of cases of police corruption arise in squads charged with the enforcement of laws relating to gambling and vice. In this county, an illustrious grand jury empaneled in December 1949, worked for 4 years on this very subject. The grand jury exposed the "malignant influence of professional bookmakers in contaminating vice squad police officers." It brought about some constructive reforms, including the establishment of the Rackets Bureau of the Kings County District Attorney's Office on a permanent basis. In this regard we point out that testimony before us from high police sources shows that the Rackets Bureau of the Kings County District Attorney's Office is the single, most effective weapon in existence in this county for combating police corruption.

Unfortunately, corruption of this type still exists, as we have learned from the evidence adduced before us. This

corruption produces disrespect for law and order and disrespect for those charged with law enforcement.

We need not relate the details of an indictment we filed on February 24, 1959, with Your Honor involving a deputy police inspector and two officers of the morals squad.

This disrespect for law and order poisons the minds of many of our young people. It produces a contempt on their part for the law and those charged with enforcing it. It leads them to deride decency and good conduct and thus promotes juvenile delinquency.

(3) The Action of Our Courts Reflects the Lack of Understanding of the Real Nature of Gambling Crimes

We find that the apathy of the public toward crimes related to gambling and vice is reflected by the courts. In the final presentment of the holdover December 1949 grand jury of this county, the point was emphasized that:

"* * * wholesale gambling has thrived in large part, because such courts have not done their duty. They have, on the contrary, conferred upon the bookmakers a sense of impunity—of immunity from the sanctions of the law—that will take a very great amount of undoing. We have had before us the criminal records of numbers of bookmakers who have been convicted time and time again—some of them up to 40 times—without ever being required to serve a day in jail."

Unfortunately, there has not been a change in the attitude of the courts. Repeatedly we have seen cases of bookmakers with numerous prior convictions both for gambling and for crimes of violence, who have escaped jail sentences. During the calendar year of 1957, in Kings County, of 157 convicted bookmakers, only 1 received a jail sentence. In 1956, of 145 bookmaking convictions, not 1 went to jail. This is true not only in this county but in other

counties as well, where a jail sentence is an unusual occurrence. This condition is part of the disease of "apathy" which exists in many other jurisdictions, where the enforcement authorities have complained to us of the cavalier attitude of the courts toward bookmakers.

It is plain to see that the courts dealing with this crime do not comprehend the seriousness of the crimes involved and their implications with regard to the public welfare. The bookmakers and policy bankers consider these court proceedings which result so often in fines as merely part of the cost of doing business—as a sort of "license" fee.

Bookmakers and policy operators are soft livers. Nothing, but nothing like a jail sentence could teach them that violating our laws is serious. As the police often put it "these bums don't like jail."

* * * * *

CONCLUSION

It is our opinion that the prompt and effective implementation of these recommendations will bring substantial improvement in the work of stamping out gambling. Relentless war must be carried on against organized crime. This war is a continuing war. We can turn the tide only by eteral vigilance and relentless prosecution of our laws. Only by such measures can we strike a truly devastating blow against gambling—the heartblood of organized crime.

Dated: Brooklyn, N. Y., February 26, 1959.

Respectfully submitted.

SECOND ADDITIONAL GRAND JURY OF THE COUNTY OF KINGS, FOR THE MARCH 1958 TERM,

By RUDY WEISSBRATTEN, *Foreman.*

Attest:

HENRIETTA V. CARTER, *Secretary.*

Testimony of Hon. Edward S. Silver Before Senate Subcommittee on Constitutional Rights of Committee on the Judiciary

Mr. Silver. I think you know that the New York State district attorney and the National District Attorneys Association both have passed resolutions with regard to giving the law enforcing agencies under proper restriction the right to tap wires in furtherance of fighting crime, which is very serious.

So I will give you this one resolution of the National Association of County Prosecuting Attorneys in connection with wiretapping.

The front page is just a communication sheet; but you pick the part of it you think is pertinent for the record.

I submit also for the record a statement issued by the executive committee of the New York State District Attorneys Association in connection with the *Benanti* decision.

(The documents referred to follow:)

RESOLUTION NO. 1—FEDERAL LEGISLATION TO PERMIT STATE LAWS AUTHORIZING WIRETAPPING BY LAW ENFORCEMENT OFFICERS

The Supreme Court of the United States has recently interpreted section 605 of the Federal Communications Act to preclude the State from enacting legislation which would legalize wiretapping by State law enforcement officers. Section 605 of the Federal Communications Act (47 U. S. C., sec. 605) provides:

"* * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person * * *."

In *Benanti* v. *United States* (78 Sup. Ct. 155, decided Dec. 9, 1957), the Court held that evidence obtained by wiretap-

ping by State officers is inadmissible in a Federal criminal prosecution. In this decision the Court said "we find that Congress, setting out a prohibition in plain terms, did not mean to allow State legislation which would contradict that section and that policy."

This interpretation of section 605 deprives State prosecutors and other law enforcement officers of one of the most effective weapons in combating serious crimes and organized criminal activity. In many instances the telephone is the usual means by which persons engaged in kidnaping, extortion and racketeering convey threats and information. This criminal activity can be effectively countered only through the use of wiretapping. In some instances wiretapping will serve to protect the lives and property of persons by providing information concerning plans for the commission of crime.

To remedy the present situation, Senate bill 3013 (85th Cong., 2d sess., Jan. 16, 1958) has been introduced by Senators McClellan, Ives, Ervin, Mundt, Goldwater, and Curtis. The bill provides that "Section 605 shall not apply to * * * (b) the interception, by any law enforcement officer or agency of any State (or any political subdivision thereof) in compliance with the provisions of any statute of such State, of any wire or radio communication, or the divulgence in any proceeding in any court of such State, of the existence, contents, substance, purport, effect, or meaning of any communication so intercepted, if such interception was made after determination by a court of such State that probable cause existed for belief that such interception might disclose evidence of the commission of a crime."

This association expressed its approval of Senate bill 3013 at the 1958 midwinter meeting at Las Vegas, Nev., and directed the president of the association to bring its approval to the attention of the appropriate committees of the Congress. The bill has not been passed and the need for immediate action is urgent. Now, therefore, be it.

Testimony of Hon. Edward S. Silver Before Senate Subcommittee on Constitutional Rights of Committee on the Judiciary

Resolved, That the National Association of County and Prosecuting Attorneys at the 1958 convention at Atlantic City, N. J., approves Senate bill 3013 and urges its immediate passage by Congress, and that the president of this association be directed to bring this resolution to the attention of the chairman of the U. S. Senate Committee on Interstate and Foreign Commerce and to the attention of the chairman of the U. S. House of Representatives Committee on the Judiciary; and further that the president of this association request the appropriate committees of Congress for permission to have various members of this association appear to testify in favor of this legislation.

Dated this 30th day of July 1958.

NATIONAL ASSOCIATION OF COUNTY AND PROSECUTING ATTORNEYS,

By J. ST. CLAIR FAVROT, *President*

Attest:

VINCENT P. KEUPER, *Secretary.*

STATEMENT ISSUED AT A MEETING OF THE EXECUTIVE COMMITTEE OF THE NEW YORK DISTRICT ATTORNEY'S ASSOCIATION, IN GARDEN CITY, LONG ISLAND, N. Y., ON DECEMBER 12, 1957, IN REFERENCE TO A DECISION OF THE U. S. SUPREME COURT IN UNITED STATES V. BENANTI, ON DECEMBER 9, 1957

In its recent decision in *United States* v. *Benanti*, the Supreme Court of the United States has declared that section 605 of the Federal Communications Act, rendering it a crime to intercept telephone conversations and divulge their contents, applies to telephone conversations intercepted by State as well as Federal officials. The effect of this decision, apparently, is to raise a doubt concerning the validity of New York legislation empowering State law

enforcement officers, pursuant to court order and under a procedure providing ample safeguards against abuses, to engage in wiretapping for the purpose of obtaining evidence of crime. Since this decision appears to deprive district attorneys and law enforcement agencies of one of their most effective weapons in combating criminal activity, we feel that certain observations are in order.

No one having any substantial experience in the field of law enforcement could entertain the slightest doubt that authorized wiretapping is an essential weapon in the fight against modern, organized crime. Without it, district attorneys and the police become virtually helpless in numerous instances where dangerous and nefarious activity is conducted by ringleaders in such fashion that their detection and apprehension becomes impossible in the absence of this tool. It is no exaggeration to state that the outlawing of wiretapping by law enforcement officials represents an incalculable boon to the underworld.

As it has operated in this State, legalized wiretapping has never produced private or public injustices of the sort envisioned by alarmists unfamiliar with the procedure employed. In fact, a joint legislative committee of our State legislature, after a thorough study of wiretapping operations in New York State, explicitly declared that they had found no abuse whatever by any district attorney in the utilization of our wiretapping procedures.

The basis of the recent Benanti opinion, so far as here pertinent, is that, in enacting section 605 of the Federal Communications Act, the congressional intention was to go beyond regulation of the conduct of Federal employees and to extend its criminal application to that of State employees as well, even though acting pursuant to the constitution and statutes of their State. Without detailing the various legal arguments to the contrary, it seems in order to point out that the actions of Federal legislators during the past few

years hardly support the proposition that such was the congressional intent.

Indeed, numerous congressional committees, devoted to exposing the extent of labor racketeering, narcotics traffic, juvenile delinquency, and other deleterious influences in this country, have consistently relied upon information given to them by State prosecutors, which information, as they well knew, was largely procured through the instrumentality of telephonic interception. It is safe to say that 100 or more Senators and Representatives have participated in such hearings where the nefarious machinations of criminal elements were divulged to the public through the medium of legalized wiretapping. It is also safe to state that not one of these legislators, nor any other Senator or Representative from either side of his House, has ever raised his voice in protest or objection to the use of such valuable information. Under these circumstances, among others, we find it difficult to believe that the Congress, in enacting section 605 of the Communications Act, intended to render the use of such interceptions a criminal offense.

In the light of the foregoing, we, in the arduous battle against racketeering and crime, necessarily importune the Congress to amend section 605 to exempt State officials from its operation wherever the particular State authorizes its law enforcement bodies to intercept and divulge telephonic communications pursuant to its constitution and statutes, with due regard for the safety of its citizens.

Present: Edward S. Silver, Kings County, president; T. Paul Kane, Schoharie County, first vice president; Abraham Isseks, Orange County, second vice president; Henry P. DeVine, Nassau County, treasurer; Richard G. Denzer, New York County, secretary; Frank S. Hogan, New York County; John M. Braisted, Jr., Richmond County; Paul H. McCabe, Chemung County; Harry L. Rosenthal, Monroe County; John F. Dwyer, Erie County; Raymond C. Baratta, Dutchess County; Frank A. Gulotta, Nassau County.

Mr. Silver. In conclusion, Mr. Chairman, I know you have been very patient here for many hours.

Senator Hennings. Mr. Silver, we don't want in any wise to restrain or limit your very splendid testimony. You have been here a number of hours, too. We are going to be here, very likely, until late tonight. We are going to be here, one place or the other, so we are glad to hear from you, sir, as fully as you wish.

Mr. Silver. What I wanted to say is this: Basically, what I am trying to bring home to the committee is this: One, that the district attorneys of our country are people who are vitally interested and have shown by their actions, not just by their words, that we understand what rights of the people are; that we have introduced legislation to protect defendants' rights, and that we have always been on the side of being concerned with the Bill of Rights and see that it is in no way violated, and nobody is in a better position than we are to know how sorely that is needed in every State of our Union.

Secondly, that most of the talk that goes on with regard to wire-tapping is with regard to people who wiretap who are not law-enforcing agencies and not charged with the responsibility of running down a crime.

As to that, the district attorneys have been vigorous, have been strong in trying to get the most dire penalties in connection with that sort of activity; that we have not advocated giving district attorneys carte blanche right to tap wires just because he feels like it.

We felt that the district attorney should and does welcome some reasonable restraint on his own judgment, be-

cause he might be so zealous about trying to convict somebody that he might go overboard, that he ought to have some restraining hand of the court who sits back and says, "What are you getting excited about? I will give you the order, or I won't give you the order."

I think the record shows where we have had strong laws restricting wiretapping, where we have operated for 20 years—people even investigated us—the State legislature fully and clearly said we have never violated the right.

At the present time, law enforcement is in a precarious position as a result of the *Benanti* case, and I want to make it clear that I am not leveling any criticism at the Supreme Court. I bow with deep respect to its decision. I am not here to say that therefore we should pass laws that stop this and stop the others. I am not talking about that at all. I am saying here is the decision; we recognize it as the supreme law of the land.

I say to the Senate and to the House that I think they ought to come to the help of the district attorneys of this country, whatever their names may be, county solicitors or prosecutors or county attorneys; that we need this right to fight crime.

We have said it, and we say it again, that if you take away from us this instrument, not only will we feel it strongly, but the people whom we represent will have taken from them an instrument which is necessary in the enforcement of laws against crime.

In New York State, particularly New York City, it has been of tremendous value, not only with regard to detecting crime, but it is our considered feeling it has been a

restraint on criminal activities. They do get careless. The telephone is such a convenient instrument for criminal activities. We have found that even though they might feel that their wires are being tapped, yet after a half dozen fellows call up, one fellow will say, "Well, we will meet in the usual place in Broadway," and you don't know where it is—another fellow will say, "Is it 1:47 as usual?" —and the next fellow will give you the time and with a little patience you generally get to know where the meetings are, and you can watch people and learn about them. At least you get vital leads to run down criminals.

So I say to you as humbly as I know how, as a law-enforcing agent, I hope that it will not be too long before Congress considers a law, at least a limited law, taking out of the operation of 605 those areas, those States that have the type of laws that New York State has where the law-enforcing agent can tap wires for a limited time on a showing of reasonable grounds that he has the basic evidence to believe that he will get evidence of crime if he taps a wire under the restraints which I have talked about under the constitution of New York State and section 813A of our Code of Criminal Procedure.

I think I have mentioned the fact that we do not countenance illegal wiretapping. I think I said that in the early part of this year we convicted two policemen who tapped wires without court order. There is no excuse for that.

Senator Carroll. Let me ask, where you have had this for 20 years in New York—I used to be a district attorney, too, many years ago, and I have had to meet this very problem in our State—evidence, no matter how acquired,

illegally or not, is admissible. It is not the rule today in the Federal system. This has been changed since the *Weeks* case, 40 years ago. I don't know what the rule is in New York.

Let me ask you this question.

Where you have had this experience for 20 years, do you believe there is illegal wiretapping going on in your own State, in your own county?

Mr. Silver. In my own county? I can talk for my own office.

Senator Carroll. I am not speaking about your office. I am not speaking about district attorneys. Your general impression, that is what we are trying to get.

Mr. Silver. I would say this, as my opinion, I have never made an investigation about it—it is my opinion that private persons, either because of some domestic-relations problem, business, whatever it may be, do resort to illegal wiretapping. I don't know how widespread it is, because I really don't know.

Let me say this about district attorneys. I say most emphatically that no district attorney would tap a wire without a proper order. As for the police, in view of the fact that they can get an order if they are entitled to it and what I know about the police commissioners the instances of wiretapping without an order are rare.

Where it is being done without the court order by a police officer, that is being done by someone who is not really interested in law enforcement anyhow.

If you need a court order, if he wanted to shake somebody down, he wouldn't get a court order, so you are dealing

again with a person who is not engaged in law enforcement. You are dealing with a person who is a law violator.

Senator Carroll: The reason I asked the question, Mr. Chairman, Kings County, I think, is either the first or the second most populated place in the United States.

Senator Hennings. Second.

Senator Carroll. You have a shifting population there. Your problems must be enormous—not that you are not a law-abiding people, but in the nature of things in your area. The reason I ask this question, is that you have operated for 20 years. You can go and get a court order. I assume when you get the court order the evidence is admissible?

Mr. Silver. It would be admissible even if we didn't.

Senator Carroll. Same applies in New York as in Colorado.

Mr. Silver. In the *DeFore* case (242 N. Y. 13; 150 N. E. 585)—but within the last month, since the *Benanti* decision came down, the admissibility of wiretap evidence was challenged and the court of appeals has reaffirmed the *DeFore* case and *Schwartz* v. *Texas* (344 U. S. 199), even though it may or may not be a violation of any law, it is still admissible. That case is *People* v. *Variano* (5 N. Y. 2d 391 (April 1959)).

Last year, the legislature introduced a bill making illegally procured wiretapping inadmissible, just limiting it to wiretapping.

The District Attorney's Association opposed the bill, not on the ground that we wanted illegally procured wiretapping evidence introduced, but because the bill wasn't clear and was cumbersome.

Memorandum to the Governor showed if they would clear up, write the bill a bit clearer, so it would be understood, that it could not be used as an instrument to discover evidence in advance, even where an order was procured; we would not oppose it. May I try to make myself a bit clearer.

In other words, if a statute was passed just saying that illegally procured wiretapping may not be admissible, a lawyer under that statute might say, even though you got an order, you did not get a legal order. The judge should not have granted you the order because you really didn't give him enough evidence on which to base reasonableness. They therefore could attack even in a situation where we got the order. Even if defense counsel felt we got a proper order they would start a voir dire proceeding to find out if we did have wiretapping, what was the wiretapping and who wiretapped, and so forth. The judge who signed the order could be subpoenaed and questioned about the basis for his signing the order.

So I want to say that the district attorneys' objection to the bill wasn't that we wanted the right to introduce illegally procured wiretap evidence, but we wanted a clarification of the bill. Let us keep in mind that defense counsel are not always as pure as the driven snow.

Senator Carroll. I started to talk about the size of your county, the number of people. I agree with what you say about organized crime. It is a real problem. This is what disturbs many lawyers: what to do about this? On the one hand you have the folks who are charged with enforcing criminal laws and these big syndicates and these big gangs that are operating.

This is on the one hand. On the other hand they have a real concern about individual liberties not only in the field of law enforcement but in the industrial field, the field of business relations, the labor and management field. Now we learn that police or private citizens can lease a whole wire and go into a home. I am not talking about district attorneys, but the question is: When you place the stamp of approval on one practice, does this extend to the other areas?

In my own area—I come from Denver—I was district attorney many years ago. We had the same problem. Perhaps Colorado district attorneys may wiretap. Our office operates much like yours. I had police officers working in my office.

I didn't wiretap. At that time it wasn't necessary. But changes have come. Syndicates move all over the country. We now have an intelligence squad in the county which will be notified by another city that so and so is coming into your town. They watch and they began moving into Las Vegas, or moving into some other place, but this is a real question: How can you place the stamp of legal approval on evidence that is acquired through wiretapping? There is a growing body of opinion favoring the watering down of the constitutional provisions of the fourth amendment on illegal search and seizure.

Many people walk out of the courtroom who are guilty when there is a motion to suppress evidence illegally obtained.

There is a body of opinion that think the fourth amendment should be mitigated.

In a changing society, with the enormous problems, the question is: Where do you draw the line?

Mr. Silver. I tell you where I draw the line. I would make every possible restriction that anybody can conceive against private people tapping. I would be glad to sit with any committee to help draw such laws. I am sure the district attorneys, State and national, would like to sit down with the committee and try to frame legislation to make the use of wiretapping by the private individuals a serious offense, as serious as you do make or dare make it in a statute, but I cannot understand—it hasn't in New York, where we have had the right, where we district attorneys have abused it, where it has been effective in the use of fighting organized crime and serious crimes—why take it away from the law enforcing agents who indicate by their attitude and point of view toward individual liberty that they use it very carefully, use it for the job that they have been elected to do, and why be concerned that if you say to the district attorney, you may use this under certain restrictive regulations for the enforcement of crime, for myself, at the moment at least, I don't understand why that should give any encouragement to any industrialist or laborite or private detective to say that the district attorney can do it under certain restrictions so that makes it easy for me to do. One has nothing to do with the other.

Senator Carroll. I have a very strong feeling that Federal enforcement agencies ought to strictly adhere to the Constitution.

Perhaps in State laws we shouldn't go too far to interfere with methods of presentation, gathering evidence, and prosecuting. Let each State function within constitutional

bounds, but it has never been held that it is denial of due process for States to act in such manner.

I don't understand all about this *Benanti* decision. I notice it says, whether by State or Federal agents, but you have just indicated that your Court of Appeals in New York has not thrown out evidence.

Mr. Silver. Let me show you, Senator, the very terrible position which I and my colleagues find ourselves in.

At the present time, I understand the Attorney General's view is this, that Congress has as yet, and he said that in the hearing before some Senate committee—Congress has as yet not had an opportunity to express itself with its desires concerning the *Benanti* case and State law enforcing agencies.

Therefore, we are now under sort of a truce.

But if Congress doesn't act soon, I think that the Attorney General will be compelled as a law enforcing agent, as a man of integrity, to say to me: "Mr. Silver—or Mr. Hogan or anybody else—if you tap wires and divulge the information you are violating the Federal law." I don't want to know about some racketeer to know what he is doing. I have no desire to satisfy my curiosity. I want to use the evidence to convict him. If I do that, the New York Court of Appeals will say sure, Mr. Silver, you may introduce that evidence and convict this defendant, but that is not going to stop the U. S. attorney from issuing a warrant against you for violating section 605 of the Communications Act. Congress must do something about it.

I, as a law enforcing agent, may not think I am dealing in dirty business. I would then find myself in the position

where I am thwarting the laws of the United States. I don't think any district attorney, and indeed he should not, is going to prosecute anyone and risk going to jail for it. Nobody is going to do that.

Senator Carroll. My point is this, and I don't say that we should do this, but just expressing myself in a very general way, supposing that that were modified to leave the State law as it was before and leave the Federal law as we think some, some of us think, it ought to be. Would that interfere then?

Mr. Silver. No, it would not.

Senator Carroll. So you are not talking about the *Rigmanti* decision in its application to Federal agents but its restriction on State agents?

Mr. Silver. In the previous Congress there was a bill, S. 3031, which was a very simple bill. It didn't go into anybody else having the right to tap, Federal or anybody else. It simply said that section 605 shall not make it unlawful for a district attorney in the State of New York who can get a court order on an affidavit of reasonableness—in other words, all we are trying to do is to say, please let us continue as we have before in New York State or such other States as have this type of legislation.

Senator Carroll. One more observation concerning Federal officers only. If we are not careful in drafting this statute and purport to grant permission to Federal officers to go into private homes and plants listening or wiretapping devices, may we not run afoul of the fourth amendment against illegal searches and seizures. What would be the difference between unlawful entry to plant a bug and unlawful entry for other purposes?

Mr. Silver. The Federal Government doesn't have the right now and wouldn't have if you passed a statute like S. 3013. It wouldn't enlarge their powers one bit. They still could not, under the decisions of the Supreme Court even if you permitted the State of New York to tap wires as they have in the past, that testimony still could not be introduced in a Federal case even if it were based on the evidence gotten by the State and under a wiretap order.

Senator Carroll. This raises the question of the *Bartkus* case. There Federal prosecutors missed a conviction in Federal court and moved it into the State court.

This raised the question of double jeopardy, which was discounted, but there was a great hue and outcry from some of the leading figures of the Nation on this thing and the Attorney General had to warn his district attorneys, his Federal district attorneys throughout the Nation, to be very careful of his practice.

All this involves again the question of the use of evidence. It is a very difficult field.

So, believe me, it is not the do-gooders and sweetness and light boys who are concerned with this issue. There are some very deep constitutional questions involved that strike clear into the marrow of our system.

The question, and if I were district attorney I know exactly what you are talking about—you have got a job to do. You have to meet modern conditions with syndicates and organized crime that have got money. They can maneuver and they can corrupt and ship in narcotics. It is international in scope—how not to tie your hands.

This is one of the great problems, too.

In the Federal Government, for example, if we took all this off when they talk—I think you made some expression about the right of the Attorney General, somebody, to investigate subversives—in this concept, everybody may be looked upon as a subversive. They could tap the telephone into my house.

This incident I told you about rose in Colorado where a wire chief made a proposition to a certain member of my staff. He could give me a contact with any telephone in Denver. This is the sort of thing, when we talk about wire, we are not talking about a single telephone, we are talking about a wire that fans into something.

Mr. Silver. A suggestion made to somebody in your staff, by somebody not in law enforcement. It was somebody thinking you would like this information.

I am talking about the very restricted right which does not affect what the Federal law enforcing agencies do at all. In other words, if 3013, which has now another number, were passed by the present Congress and signed by the President, the Federal people would have no more right to do anything more than they have at this minute. They are not going to enlarge their right by giving us 3013. All you do by 3013, you say if New York State or Illinois or California wishes to pass a bill in California or New York saying that under a court order if you get a court order you are restricting us anyhow, but I don't mind the restriction—but if you get a court order based on reasonableness, you may tap wires against people that you believe, honestly believe, are engaged in crime.

That is all we are asking for.

I say that if we were fellows who asked this and didn't have a record of decency behind us, not only with regard to 20 years of operation but with regard to other things that we do, our attitudes toward defendants, rights of people, one might say "am I right about these fellows—I don't know if I can trust them with this right, but the record shows, if I say so myself, that we could be trusted with this power which we have never had and never abused."

Senator Carroll. I thank you, Mr. Chairman.

Senator Hennings. Thank you for your contribution, Senator Carroll.

I would like to announce now that at future hearings on this subject matter which we expect to have and, indeed, I am sure we are going to have, the subcommittee will hear two witnesses who were invited to the hearings today but could not appear—Mr. Joseph Welch whom most of you know or know of, a very prominent lawyer in the city of Boston; and Mr. Whitney North Seymour, who will be president of the American Bar Association next year, an active member of the bar of the city of New York. I have had many pleasant and profitable discussions with Mr. Seymour on a variety of questions going clear back to the time of the Bricker amendment.

We all know something not only of Mr. Welch's high order of ability but also his philosophy.

Mr. Silver, on behalf of the Senate and this committee, I want to thank you.

I know how busy you are—I don't really know how busy you are, but as I said to Lauris Norstad, the head of

SHAEF, in Paris a year so ago, nobody knows the responsibility you have except you.

I say to you that nobody knows how busy you are except you.

We appreciate very much your having taken your time, as we appreciate Mr. Dash's taking his time, to come down and shed more light upon the subject which has raised many, many questions in the minds of, as Senator Carroll says, not just the breast beaters and the professional liberals, but some people who are concerned, very deeply concerned with basic constitutional rights; also, indeed, deeply concerned with the protection of the people who cannot protect themselves against people who do not behave themselves—the predators, the mobs, the gangs. We all know something about that. We have had to deal with them.

• • • • •

STATE OF NEW YORK

COMMISSION OF INVESTIGATION

TRANSCRIPT OF PUBLIC HEARINGS

concerning

THE CURRENT WIRETAPPING DILEMMA IN NEW YORK STATE CREATED BY RECENT FEDERAL COURT DECISIONS

270 Broadway
New York, N. Y.

April 5, 1960
10:00 A.M.

Before:

GOODMAN A. SARACHAN,
Chairman,

JACOB GRUMET,
MYLES J. LANE,
JOHN W. RYAN, JR.,
Commissioners,

NATHAN SKOLNIK,
Deputy Commissioner,

ELIOT H. LUMBARD,
Chief Counsel.

Testimony of Hon. Frank S. Hogan Before the New York State Commission of Investigation

TRANSCRIPT OF PROCEEDINGS

The Chairman: This public hearing will come to order. The reporter will now be sworn.

(Herman Rosenfield, the reporter, was thereupon duly sworn.)

The Chairman: Section 2, Subdivision 10 of the Act creating this Commission reads as follows:

> "By such means and to such extent as it shall deem appropriate, the Commission shall keep the public informed as to the operations of organized crime and problems of criminal law enforcement in the State."

The four members of this Commission have unanimously agreed that a serious problem of criminal law enforcement has been recently created by certain Federal Court decisions. These are concerned with the use in State criminal trials of evidence procured by wiretapping. Under the Section that I have read, therefore, this Commission deems it of paramount importance to inform the public of the seriousness of this problem.

There are two aspects which we believe the evidence presented at this hearing will disclose:

First: That wiretapping, as permitted by the Constitution and laws of this State, does not in the slightest degree threaten the privacy of telephone conversations between ordinary law-abiding citizens;

And second: That forbidding the use of wiretap evidence in a State criminal trial will seriously hamper the attempts of law enforcement officials to stamp out organized crime and racketeering.

Recently, as most of you undoubtedly know, a Federal Court enjoined the use of wiretap evidence in a serious criminal trial and, therefore, delayed the ordinary course of bringing this case to trial. Other decisions along the same line have sharpened the present crisis. Some New York Judges have refused to grant wiretap orders which are perfectly legal under State law upon the ground that to do otherwise would give judicial sanction to an act illegal under Federal law.

As a result, numerous applications have been made on behalf of defendants to stop or reverse their prosecutions, and district attorneys, too, have, I know, with reason, hesitated to proceed with certain cases. Investigations of great public importance—especially those dealing with organized crime in the fields of narcotics and official corruption—have been halted or severely restricted.

Those of us who are endeavoring to deal particularly with organized crime and public corruption feel that the administration of criminal justice in this State is gravely affected. We feel it of the utmost importance to enlighten the people throughout the State as to this situation so that public opinion, at least in New York State, will bring pressure to bear on Congress to make the necessary amendment to the Federal Communications Act.

Briefly, the legal character of the problem is as follows:

Testimony of Hon. Frank S. Hogan Before the New York State Commission of Investigation

Intercepting telephone messages—popularly called wiretapping—is illegal and a felony under the law of this State when it is unauthorized. The exception in the law is carefully restricted so as to safeguard private individuals and protect their civil liberties. And I know that I speak for my three fellow Commissioners when I say that all of us are as anxious to safeguard private individuals and protect their civil liberties as anybody else.

A legal wiretap may be made only when authorized by a Court upon formal application. This application may be made only by a relatively few public officials, who must submit a sworn statement that there exists "reasonable ground to believe that evidence of crime may be thus obtained".* When a Court does authorize a wiretap, it can be effective for not more than two months. Also, the divulgence of information obtained by wiretap is very much restricted.

The procedure which I have thus outlined is expressly authorized by Article I, Section 12, of the New York State Constitution, by Article 73 of the Penal Law of this State, and Sections 813-a and b of the Code of Criminal Procedure.

The right of New York State under its fundamental police powers to make such provisions in its Constitution and law would seem to be clear. However, some Courts have now interpreted a Federal statute—Sections 605 and 502 of the Federal Communications Act**—to prohibit and actually make criminal these State procedures if information obtained by wiretaps is revealed or used in any way.

---

* Section 813-a, New York Code of Criminal Procedure.

** Title 47, United States Code.

On the other hand, New York Courts have unanimously held that Section 605 of the Federal Communications Act does not require the exclusion of wiretap evidence in New York Courts when properly introduced.

It is obvious that the action of Federal Courts barring evidence in a New York State criminal case obtained by Court Order and admissible in New York Courts has raised a serious dilemma.

During these hearings today and tomorrow, the Commission intends to explore fully the practical results of the present confused situation. We believe the hearings will provide important information for the public on this vital issue. Ultimately, as above indicated, the remedy lies in an amendment of the Federal Communications Act by the United States Congress.

And so, because of what I have been saying, we have invited many prominent law enforcement officers and other distinguished gentlemen who are interested in the present problem concerning wiretaps, who will testify at this hearing. Since this is a hearing for public information and not the result of a criminal or public corruption investigation, we are not going to ask these distinguished gentlemen to be sworn.

The first witness is Mr. Frank S. Hogan, the distinguished District Attorney of New York County.

Mr. Hogan: Mr. Chairman, Commissioners,—

The Chairman: May I ask you a few questions preliminarily.

Mr. Hogan: May I first thank the Commission for providing this forum to me and my office. I know I express

the thought of all law enforcement officials in our State in expressing appreciation to the Commissioners for giving us this opportunity to give voice to the dilemma which we face as a result of these Federal decisions.

The Chairman: Mr. Hogan, how long have you been District Attorney of New York County?

Mr. Hogan: Since January 1, 1942.

The Chairman: During these 18 years or so as District Attorney, you undoubtedly have had a great deal of experience with wiretaps, is that correct?

Mr. Hogan: That's true.

The Chairman: During these many years, you undoubtedly have come to some conclusions as to the need of Court-authorized wiretaps in the field of law enforcement, is that correct, sir?

Mr. Hogan: True.

The Chairman: We understand, Mr. Hogan, that a serious problem has developed in the field of law enforcement as a result of recent Court decisions relating to an interpretation of Section 605 of the Federal Communications Act, and regarding the use in State criminal trials of evidence procured by wiretapping pursuant to Court Order. I assume from what you say that you agree with that statement?

Mr. Hogan: I do, indeed.

The Chairman: Mr. Hogan, will you please tell us in your own way about these problems and then perhaps after you have finished telling us we may have a few questions we would like to ask you.

Mr. Hogan: Fine.

Mr. Chairman—

The Chairman: We have a request to set up some equipment here, and so we will take a short recess for a few minutes, if you don't mind, Mr. Hogan.

Commissioner Lane: We are televising this, in view of the fact that it is something of public interest.

Commissioner Grumet: Ordinarily we do not permit television cameras to be set up for our hearings, but in view of the fact that this is for public information and public education, we may consider that in this particular case, is that correct?

The Chairman: That's correct, yes. We feel very strongly that in most of our public hearings, certainly private hearings, we do not have television cameras, but since our principal purpose in this entire hearing is to inform the public and as widespread a public as possible, we will ask your indulgence for a few minutes.

Commissioner Lane: Do you have any objection, Mr. Hogan?

Mr. Hogan: None.

(A recess was taken.)

The Chairman: We would like to have the hearing room very quiet, please, while Mr. Hogan proceeds.

Mr. Hogan: Mr. Chairman and Commissioners: What I have to say this morning, for purposes of outline, can be roughly divided into three sections. As your first witness, it may be appropriate for me, initially, to deal with some of the wild charges that have been made with respect to wiretapping, legal and illegal, in order that we may

put the use of this investigative technique by New York State law enforcement officials in what I think is proper perspective.

In the second part of my statement, I shall consider with you the experience of my office with wiretapping, and I shall try to show why we have concluded that it is an irreplaceable weapon, in the fight against organized crime.

Your Chairman, in his letter of invitation, has suggested that specific examples of usefulness of this technique might be of interest. I shall make reference to a number of cases and investigations where the privilege accorded to us to intercept telephonic conversations has been of inestimable aid.

Finally, I should like to discuss the legal status of wiretapping today—the great confusion that exists as the result of recent Federal Court holdings, and the dilemma these decisions and opinions pose to conscientious, local law enforcement officials.

Initially, therefore, in attempting to evaluate legalized wiretapping by comparing its unquestionable benefits with its possible abuses, we must keep a sharp eye out for the hysterical alarmist with a flair for the dramatic. It has been our experience that this field produces the most extravagant accusations of abusive practices, as ill-founded and unsupported as they are shocking, and as irresponsible as they are inaccurate.

You will recall that some years ago Mr. Justice Douglas of the United States Supreme Court, in a book called "An Almanac of Liberty" stated that, in the year 1952 alone, there were in New York City at least 58,000 Court orders

permitting wiretapping. When called before a Congressional committee considering wiretapping in 1955, the "legman" or reporter or researcher employed by Justice Douglas beat an unashamed retreat. He first stated that this figure of 58,000 included illegal wiretaps as well as those pursuant to Court Orders and then, by way of amplification, indicated that he was unable to recollect the name of a single one of the informants who allegedly supplied the factual quicksand upon which his calculations were unfounded.

Now, when you get a United States Supreme Court Justice making such an unsupported and such a ridiculous statement—and mind you, he hasn't retracted it to this day—and his figures are off by at least 10,000 percent, it is well to examine carefully the promiscuous, hearsay contentions of lesser personages who find that this kind of mathematical shocker readily attracts the ear of the community.

Last year, Samuel Dash, in a book called "The Eavesdroppers" indicated that in New York City illegal police wiretaps might run as high as 30,000 a year. Mr. Dash, more careful than Justice Douglas, pointed out that this astronomical figure did not represent legal wiretaps. But here again, you read his book and you find that it is based on mathematical speculations supported only by the allegations of anonymous persons.

Now, I don't know what conclusions Mr. Dash reached—how he feels today about legalized wiretapping—but I do know that, when he was District Attorney of the City of Philadelphia, he strongly supported it. I quote just the

first paragraph of a letter he sent to me on May 12, 1955. It is on a letterhead, reading, "Samuel Dash, Acting District Attorney, Philadelphia, Pennsylvania":

> "Dear Mr. Hogan: At present we are in a drag-out, knock-down fight in Pennsylvania on wiretapping. Our office fully agrees with your position on this question and believes that it is vital to effective law enforcement that Court-supervised wiretapping by the District Attorney should be permitted."

Actually the Douglas and Dash figures are absurd. A statewide survey by our New York State District Attorneys Association, conducted some years ago, revealed about 500 legal wiretaps annually in the entire state. With respect to the alleged illegal wiretaps by law enforcement personnel, I can only say that in my 18 years of experience as District Attorney I have never received any evidence or even a complaint that a police officer has used this information for corrupt, extorsive or coercive reasons, and there wouldn't be any other reason for using it illegally.

I am aware that there was a presentment in Kings County which made reference to several examples where this had been done and I am not here to suggest that it hasn't happened, but all I can say is that in the light of my long 18 years of my long experience, it seems to me that, if it were as prevalent as Mr. Dash suggests, we would have had many complaints about police engaged in this illegal activity. We have had complaints about them in every other area of penal law, unfortunately, although in minor degree and percentage and they have been accused of many other things, but not illegal wiretapping.

And since we have handled, in the time I have been District Attorney, some half-million matters it would not seem that illegal wiretapping could possibly be as prevalent as Mr. Dash's figures would suggest.

For a more accurate picture of abusive wiretapping, so-called, by law enforcement agents, one should read, I think, the 1956 report of the Committee on Civil Rights of the New York State Bar Association, headed by Whitney North Seymour, which stated, and I quote:

> "We want to make clear that we do not assert that there has been any widespread illegal wiretapping activity or even excessive resort to lawful use of wiretapping by public officials. We are fully aware of the problems which they have. Such officials in this State are fine public servants, zealous in the discharge of their duty and conscious of legal restrictions."

Along similar lines, the 1957 report of the New York State Joint Legislative Committee on Illegal Interception of Communications said:

"We know of no instance in which illegal wiretap evidence has been offered by any prosecutor since law enforcement wiretapping was regularized in 1938", and further the Committee said, "It may be emphasized that these bills introduced by the Committee have been related primarily to violations of privacy by private investigators; not to any charges of abuse or misconduct by officers of the law."

On the subject of the number of legal wiretaps in New York City, I should like to make some comments: In so

far as my office is concerned, I have had prepared two statistical charts. These show the extent of our overall prosecuting activity, the number and kinds of investigations in which wiretaps were installed, and the results obtained. The figures, I think, demonstrate that, although wiretaps were installed in a very small percentage of our cases, they have produced remarkable results in the toughest type of investigation, those involving organized crime and corruption.

This first chart will indicate the experience of our office in the last ten years. To the left on the chart you will see that we have tried to indicate the criminal business of the office. Taking last year, for example, we had 4,116 dispositions in the Court of General Sessions; 28,045 dispositions in the Court of Special Sessions; 2,290 gambling cases and dispositions in the Magistrate's Court. The other cases, for the most part, in the Magistrate's Courts do not originate in our office, nor do we conduct any investigations, so they have been excluded.

In addition, we have had some 11,017 complaints, making a total of 45,468 criminal matters that were disposed of in New York County alone.

Now, only in 17 investigations did we go to the Judges of the Court of General Sessions and ask for permission to intercept telephone conversations, and we obtained some 75 Orders in those 17 investigations. The letter there indicates that, in addition to the number 75, there were Court Orders in three additional instances where the taps were not installed. Evidently an arrest intervened, or for some reason or other we didn't exercise the authority, but even

adding three, that would mean that only 78 orders were signed in the year 1959. Some demon calculator has figured —if you look at the next column—that that means that the number of wiretap orders per 1,000 dispositions in New York County in the year 1959 was 1.6 less than two wiretap orders for every thousand criminal dispositions.

Now, what were the results? Well, there were in 1959, 41 arrests and, up to today, there have been 13 convictions and 25 cases are pending. Now you will see that 1959 is pretty much an average year. For the 10-year period there were 343,745 dispositions. Interceptions were permitted in 219 investigations; 727 orders were signed by Judges of the Court of General Sessions. The average over the 10-year period is 2.1 wiretap orders per 1,000 dispositions; 458 arrests resulted; 335 convictions; 70 acquittals or dismissals; 17 otherwise disposed of, abated by reason of death or for some other reason, and 36 cases pending.

Well, I don't want to belabor the point, but I think the chart clearly shows, and these figures show, that legalized wiretapping is not, as has been charged sometimes, irresponsibly and excessively utilized in criminal investigations. In other words, Commissioners, we do not abuse the privilege. We are very careful to exercise the privilege only in those cases where other means of investigation are unavailing.

We have seen—and I want to make this further point, particularly since the Chairman in his opening remarks emphasized the concern that all of us feel, all law enforcement officials feel about the privacy that every citizen is

entitled to in matters of telephone conversations—but we have seen that, in this period of ten years, we obtained orders from General Sessions judges 727 times. If you divided that by 10 you get a little less than 73 orders in the course of a year. That would be the average number over this 10-year period.

Now, our City police, I am advised, utilized an additional 70 in Manhattan in 1958 and 90 in 1959. Incidentally, in the entire city the police got only 124 orders in 1958 and only 225 in 1959.

But, confining ourselves to Manhattan, we see, if we take our office average of 73 and the average for these two years of the Police Department of 80, we have in all 153 orders, including renewals, in New York County for an average year.

A wiretap order lasts only 60 days, so it is obvious that, on an average, at any one time the number of legal interceptions in existence in New York County is less than 30. If you compare this figure to the number of telephones in New York county—at present estimated by the Telephone Company to be just under 1,800,000—you get some indication of the danger of a law enforcement official listening in on a conversation that doesn't concern some criminal enterprise.

I think these figures afford a mathematic basis for evaluating the so-called "danger" of wiretapping. It comes out to about one wiretap to every 60,000 telephones. This is less than 1/600 of 1%. Any scientist, figuring zones of tolerance for rocket engines, might well be proud of such precision.

And, even in this small percentage you are dealing for the most part, you are asking the privilege to intercept telephone conversations of subscribers who have criminal records and who, it has been clearly demonstrated to the satisfaction of a judge, are engaged in some criminal business. So that there is only a microscopic likelihood that there will be a legal tap on an innocent person's telephone. When that is weighed against the value to the community of wiretapping, in terms of cases that could not be made if it were not for this privilege, the argument for wiretapping is, it seems to me, based on my 25 years experience in the District Attorney's office, conclusive.

The second chart, and I am sorry that I haven't it in the same form as this one, but I do have copies of it—

The Chairman: Mr. Hogan, you would have no objection if we made these charts part of the record?

Mr. Hogan: Certainly not.

The Chairman: Have the first chart which you have been describing designated Exhibit 1 in the record.

(Chart entitled, "Overall Prosecuting Activity, etc., in New York County" was marked Commission's Exhibit No. 1.)

Overall Prosecuting Activity and the Use of Court-Ordered, Legal Wiretapping Office of the District Attorney, New York County, for Ten Year Period 1950-59

Year	Criminal Matters Disposed of— General Sessions	Special Sessions	Magistrates Court (Gambling)	Complaints	Total	Number of Investigations Where Wiretaps Installed	Number of Wiretap Orders Including Renewals	Number of Wiretap Orders per 1,000 Dispositions	Number of Arrests Resulting	Convictions	Acquittals and Discharges	Otherwise Disposed of	Cases Pending
1950	2,685	12,693	2,986	11,147	29,511	25	74	2.5	51	41	8	2(C,D)	0
1951	3,151	13,292	2,298	11,611	30,352	20	81	2.7	57	55	2	0	0
1952	3,428	11,063	1,606	11,796	27,893	28	102	3.6	41	28	8	5(C)	0
1953	3,632	12,292	1,967	11,623	29,514	25	100	3.4	36	17	18	1(C)	0
1954	3,983	13,881	1,658	10,259	29,781	33	97	3.2	92	62	26(B)	4(A)	0
1955	3,640	17,836	2,507	10,308	34,921	17	41	1.2	70	61	7	2(C)	0
1956	3,237	18,510	2,526	10,615	34,888	28	53(E)	1.5	34	33	0	0	1
1957	3,462	21,604	2,289	10,411	37,766	11	55(F)	1.5	18	13	1	0	4
1958	4,026	24,658	2,306	12,661	43,651	15	49(G)	1.5	18	12	0	0	6
1959	4,116	28,045	2,290	11,017	45,468	17	75(H)	1.6	41	13	0	3(C)	25
Total	35,360	173,874	22,433	111,448	343,745	219	727	2.1	458	335	70	17	36

Note:—As of July 1st 1957—Renewals required every two months instead of six months

(A) D.O.R.

(B) Cases of 15 attorneys are pending before Coordinating Committee on Discipline of the Bar, 5 of whom were convicted and 10 dismissed in our courts.

(C) Turned over to other authorities.

(D) Abated by death.

(E) In addition to these, court orders in Five additional instances, but taps not installed.

(F) In addition to these, court orders in One additional instance, but taps not installed.

(G) In addition to these, court orders in One additional instance, but taps not installed.

(H) In addition to these, court orders in Three additional instances, but taps not installed.

Testimony of Hon. Frank S. Hogan Before the New York State Commission of Investigation

Mr. Hogan: The second chart, so-called, indicates the types of investigations where these orders were secured and installed. You will see that it runs pretty much the gamut of crime categories.

The Chairman: The second chart is designated Exhibit 2 in the record.

(Document entitled "Typical Investigations, etc., in New York County" was marked Commission's Exhibit No. 2.)

NEW YORK COUNTY

Types of Investigations Where Wiretap Orders Were Secured and Installed 1955–59

Categories of Crime	Number of investigations in which wires were installed
Extortion, coercion, blackmail	22
Bribery and official corruption	18
Larcenies and allied frauds	12
Usury and rent gouge	7
Perjury and criminal contempt	6
Organized gambling (lottery, policy, bookmaking)	4
Illegal wiretapping	4
Abortion	3
Robbery, assault, and possession of weapons	3
Criminal receiving, burglar's tools	2
Narcotics	2
Misrepresentation to obtain information from phone co. (PL 743 sub. 2)	1
Others (jury tampering, forgery, etc.)	4
Total	88

Mr. Hogan: About 50% of them were concerned with extortion, coercion, blackmail, bribery, official corruption, larcenies and allied frauds—these are the cases where it is extremely difficult to get evidence and its use is certainly justified in such cases. But there is a great range of criminal activity that we seek to investigate and that is indicated, I think, in this chart.

Perhaps it would be helpful if I referred to certain investigations which have been conducted by my office and which have been successfully concluded through leads and information furnished by wiretaps.

Commissioner Grumet: Mr. Hogan, before you do that I think it may be a good thing if we cited the specific figure. You said 50%. I noticed that on a total of 88 investigations in which wiretaps were installed, 52 were in the categories that you mentioned, such as extortion, coercion, blackmail, bribery and official corruption, larcenies and allied frauds, which are the more important cases.

Mr. Hogan: I think Commissioner Grumet, that those categories would largely describe the work of the Rackets Bureau and the Frauds Bureau of our office and those bureaus are engaged in the long, complex investigations that take enormous manpower and that ar ost difficult of solution. So it is in the field of organized crime where this technique, investigative technique, is most useful.

Occasionally, as you can see here, we have used it in combatting other crimes such as illegal wiretapping and gambling, of course, where it is organized narcotics and other things.

Commissioner Grumet: But there also seems to be a common notion that it is used frequently in cases of prosti-

tution, and I noticed that it hasn't been used by you in any cases involving prostitution. The public seems to resent that in the field of prostitution. I notice there has been no wiretapping here, according to your figures, in prostitution.

Mr. Hogan: We would never use it unless prostitution were organized as it was in Luciano's day or as gambling was and is organized by mobs and syndicates at the present time, and as we recall it in the days of Frank Erickson and other top gamblers and mobsters.

Several years ago we had a so-called basketball investigation that unearthed corruption in this college sport on a nation-wide scale. This scandal involved 15 professional fixers, 33 players, 6 colleges, and 49 college games in which score-rigging deals were negotiated in New York and in 22 other cities in 17 states.

In the 14-month investigation, information obtained over the wires enabled us to piece together an accurate picture of the workings of this bribery ring. The recordings of incriminating conversations led some recalcitrant witnesses to break and to cooperate against the fixers and higher-ups. Thirty-eight arrests resulted and of these 36 were convicted, including 14 of the 15 fixers. The 15th died before his trial was completed.

Now, this was a case that just couldn't have been started without this privilege. All we had after months of investigation could be labeled rumors. But a newspaper man, Max Kase of the Journal American, came in one day and said "Are you interested in this sort of thing?" and we said "Yes".

He said, "Well, watch Eddie Gard of Long Island University". That was a tip that proved invaluable. Detectives

were assigned to Gard and they found that he was meeting a character named Solazzo. This Solazzo, who had a long criminal record, was ultimately convicted in addition to all his other convictions, of smuggling gold into this country.

Well, Solazzo was meeting underworld characters. He was also meeting basketball players from schools other than Long Island University. So with this information, obtained by means of surveillance, we were able to prepare an affidavit which persuaded a judge of the Court of General Sessions that we should have the privilege of intercepting the conversations of Solazzo, this criminal.

We were able, as a result of intercepted conversations, to cover Solazzo's meetings. Of course, this gave us vital information. We could cover the meetings with basketball players and we had the conversations with the players, so that, when ultimately we called them in to the office and they lied their heads off—said they weren't involved—it was a simple expedient to play these intercepted telephone conversations. And, in the course of one night, a half dozen of them broke and gave us the names of the fixers.

But I don't think we could have made a dent in this criminal enterprise, which was affecting college sport all over the country, without this privilege accorded to us by our statute and by our Constitution.

Wiretaps were used to advantage in successfully prosecuting a half million dollar stolen bond ring, led by one Irving Mishel, who acted as a broker for burglars specializing in stolen securities.

His system of marketing or disposing of these securities was most devious and complex. He operated with forgers and other characters of underworld repute, including one

Irving Nitzberg, an alumnus of "Murder, Inc." A wiretap on Mishel's phone was the prime factor that resulted in his indictment, conviction and a 10 to 20 years prison sentence.

In addition, Nitzberg and eight others were arrested and indicted. All pleaded guilty to charges of grand larceny and forgery.

Wiretaps also enabled us to break up an intricate conspiracy involving a ring of crooked policy operators who succeeded in fixing the figures upon which their game was based, so as to reduce their payoffs on winning numbers to a minimum.

This scheme depended to a large extent upon manipulation of daily clearance figures of the Cincinnati Clearing House and upon a network of daily telephone calls between Ohio, New Jersey and New York. The use of the telephone to further the criminal conspiracy proved to be the gangsters undoing—and they were gangsters. They weren't just gamblers, as this Commission has properly pointed out.

Gambling of this size is a mob enterprise and the interception of telephone calls was the only way we could reach this three-state mob. Eight of them were convicted upon charges of conspiracy and contriving a lottery, including, if you please, the secretary of the Cincinnati Clearing House, one of the most reputable citizens of Cincinnati, who was being paid a thousand dollars a week for supplying a number, the third digit of the payoff, each day. He would select the number that had the least play on that particular day.

Recorded wiretap conversations were most helpful in bringing about the conviction of the New Jersey insurance

broker, Louis Saperstein, and the indictment of his underworld associates, Scalise and Cilento.

These underworld associates, operating between New York and New Jersey, were able to siphon off from a labor union welfare fund the sum of $300,000 in less than three years.

Wiretap evidence is probably the most important element in any attempt to deal with fake charity racketeers who operate multi-phone boiler room, so-called, from which solicitations of funds bring in fantastic amounts from a gullible public. I don't think you could even make an attempt in that area without this privilege.

Our wiretaps led directly to the capture of a participant in a $107,000 payroll stickup, Sam Granito, who was wanted by the Boston police.

Wiretapping is a powerful investigating weapon in the field of labor racketeering where the criminals' cunning and the victims', the businessmen's fear, would otherwise combin to conceal crime and make a mockery of law enforcement.

Our files are full of cases where, but for wiretaps, some of the worst racketeering offenders might well have gone unpunished.

Without wiretaps, for example, we never could have convicted the powerful waterfront labor boss, Mike Clemente, and his two lieutenants, Saro Moganero and Louis Gaccione.

John DioGuardi, labor racketeer and former associate of Lepke and Gurrah, returned to his haunts in the garment area after serving a term for extortion. Surveillance, including wiretapping, was undertaken since he seemed to be blossoming out as a power in a number of labor unions.

This surveillance was productive. Two of Dio's lieutenants in one of the unions, Anthony Topazio and an ex-burglar, Joseph Cohen, were convicted for trying to shake down a flower bulb concern. They were sentenced to the penitentiary.

Another associate of DioGuardi, Samuel Zachman, tried the same extortion racket in the messenger service industry. He and his partner, Nicholas Leone, were convicted and sentenced to State Prison as a result of wiretapping.

This DioGuardi—we have kept track of him for years through surveillance and wiretapping, and we have found him in all sorts of criminal enterprises and many, many indictments have resulted.

I won't burden the record with others—Samuel Goldstein, Max Chester—there are many others who were convicted on evidence obtained by wiretapping.

In the field of labor extortions, we have, in 1954 alone, six arrests of faithless labor leaders who were convicted of extortion; Aaron Kleinman, Secretary-Treasurer of Local 875—these are unions in the International Brotherhood of Teamsters—Nat Carmel, Vice President, Local 875; Jack Berger, President, Local 875; Sam Zakor, Business Agent, Local 875 and 275; Milton Levine, President Local 275, Business Agent, Local 875; and Jack Priori, Business Agent, Local 875 and 275. All plead guilty to charges of extortion, conspiracy—

Commissioner Grumet: Too bad Mr. Justice Douglas isn't here to listen to it.

Mr. Hogan: Continuing with DioGuardi, and more recently, we were concerned with his activities and those of

James Plumeri, whom you may recall, Commissioner Grumet—

Commissioner Grumet: Very well.

Mr. Hogan: —alias Jimmy Doyle. I must point out that Commissioner Grumet indicted and convicted Plumeri, so there can be no misinterpretation of my reference. And Anthony "Ducks" Corrallo.

It was found that these racketeers were associating with Frank Carbo, a boxing racketeer and gunman. Court-approved telephone wiretap plants were installed, some of which were monitored around the clock, to keep track of the doings of these characters.

Many important underworld meetings were arranged on the telephone so that our detectives were enabled to cover the meetings and identify the participants at those meetings in cities as far away as California.

The following arrests were made: Carbo was charged with being an undercover fight manager and with the crime of conspiracy; Gabe Genovese, undercover fight manager; Harry Siegel, undercover fight manager; Samuel Grossner, unlicensed fight manager; Bert Grant, charged with bribery of a participant in a professional sport.

Carbo has pleaded guilty, Genovese has been found guilty. The other cases are pending. In addition, James D. Norris resigned as President of the International Boxing Club as a result of this activity and there are a half dozen matchmakers and promoters who lost their licenses when the interceptions were turned over to the New York State Boxing Commission.

I have tried to indicate, by this sampling, how very valuable this privilege is. I have tried to indicate how spar-

ingly we use it. Now I would like to conclude by making some reference to the legal status of wiretapping.

For more than thirty years, it has been the law in this country that wiretapping by law enforcement officials, with or without a court order, is not a violation of our Constitution. It may be prohibited by Section 605 of the Federal Communications Act, but no court has said that it violates any section of the Bill of Rights. The law was established so long ago as 1928 in the Olmstead case.*

Most people can only recall two words from that decision —the phrase, "dirty business", as used by Justice Holmes in his dissent. But what they overlook is that Justice Holmes expressly disavowed the position that wiretapping was violative of our Federal Bill of Rights. And, when he used the "dirty business" phrase, he was not describing legal wiretapping so much as he was characterizing the activities of Federal officials who, in gathering evidence, committed a crime.

These Federal officers committed illegal wiretapping. They tapped wires illegally, without court order, in defiance of the penal sanctions of the State of Washington.

In 1957, two and a half years ago, the United States Supreme Court, in Benanti against the United States,** held that the express language of Congress, used in Section 605 of the Federal Communications Act of 1934, barred wiretapping or, at least, interception and divulgence of telephonic communications—even when done by state officials pursuant to authority granted by state law.

---

* *Olmstead* v. *United States*, 277 U. S. 438 (1928).

** 355 U. S. 96 (1957).

Testimony of Hon. Frank S. Hogan Before the New York State Commission of Investigation

The language of Section 605 was thus interpreted for the first time, some 23 years after the passage of the Federal Communications Act, without regard, I submit, to that Act's legislative history.

The pre-passage history of the 1934 Act fails to reveal that its purpose was to bar wiretapping by authorized state officials. There had been prior efforts at enacting a Congressional ban on all wiretapping but these efforts had failed. Section 605 of the Federal Communications Act was not, at the time, regarded as another such effort. Rather, it merely repeated a portion of the earlier 1927 Radio Act, with the design of conferring upon the Federal Communications Commission jurisdiction over radio and wire communications.

An admirable statement was made by Assemblyman Savarese, Chairman of the New York State Joint Legislative Committee on Privacy of Communications, only recently, March 14, 1960. I would like to quote a few paragraphs from it with reference to the intent of Congress in passing the 1934 Communications Act.

Mr. Savarese, speaking for the Committee, says, "The crux of the matter lies not in any court decision but in the intent of Congress, which has never adequately expressed itself on wiretapping.

"The Supreme Court has erected a vast super-structure of opinion law on a 'sleeper' of 31 obscure words in the Federal Communications Act of 1934, which were obviously never intended as definite legislation on wiretapping.

"What this adds up to is that for a quarter of a century the Congress has abdicated its duty and made the Supreme Court take over its legislative power in this area. Congress

never debated or even mentioned wiretapping when it passed the Act of 1934—20,000 words regulating the telegraph, telephone and radio industries. Yet a brief, obscure and unidentified clause in the act—truly a needle in a legislative haystack—has become the sole basis for a vast amount of law, as declared in Supreme Court opinions.

"The clause, merely forbidding the interception and divulgence of messages, is a cryptic, delphic utterance; and the Supreme Court has labored industriously to define its meaning.

"Doubtless, the learned justices felt they were on the side of the angels when they declared on this basis years ago that law enforcement wiretapping was unethical and immoral. But how many angels does the Congress expect to stand on the point of a needle?

"If", Assemblyman Savarese continues, "Congress really intended to deal with the complex subject of wiretapping in the 1934 Act, it did so in an inadequate, slipshod, half-baked way.

"I do not believe for a minute that Congress intends now to supersede the police power of our fifty states. This would break down our entire structure of criminal law. But Congress should clarify its intent, in its own words, instead of putting this legislative burden on the Supreme Court."

That ends what I think is a very fine statement with respect to the history of this 1934 Communications Act.

Now, I have further evidence that Congress, in 1934, did not intend to ban wiretapping, pursuant to court order. It seems clear to me that the use by various congressional committees of taps, which have been legally made by state

officials, and thereafter supplied by district attorneys offices to the Congressmen and Senators, is an acknowledment by them that they had no such intention.

I recall that, when I appeared before the House Judiciary Committee in 1955, Congressman Celler, the Chairman of that Committee, said, and I quote from the transcript. It says: "Congressman Celler: I think the general idea of this committee is that we would not interfere with the practices, the legal practices, that obtained in the various states. So you can set your mind at rest as far as New York is concerned. That is New York's problem and I don't think we would attempt to make the Federal statute paramount. I don't know that we could. If there are any restrictions inconsistent with the New York statute. I am sure the New York statute will prevail insofar as New York is concerned".

Over the years my office—and I am sure other offices, Mr. Silver's and many other offices—we have provided transcripts of telephone conversations to Senate committees, to House committees, to the New York State Athletic Commission, to the New York State Crime Commission—I think even this Commission has availed itself of them, occasionally. And, may I say, the Commission of Investigation has reciprocated; our working arrangements have been most cordial and rewarding. I have dozens of letters from Senators and Congressmen, thanking me for the use of these transcripts. I just can't believe that Congressmen and Senators would so stultify themselves as to pass a law forbidding wiretaps and then use the intercepted telephone conversations in regularized Senate and House

hearings. But they do accept these interceptions, they do utilize them, they do ratify them by their use of them in these committees.

Here I have a letter from Estes Kefauver dated July 5, 1951. He says:

"I have just read with great interest Lester Velie's article in the July 7th issue of Colliers, entitled 'Crime Busting is Right Up Hogan's Alley', and I was attracted by the sentence which reads, 'It was Hogan's material that stole the show and helped make the Senate crime investigation a smashing success!'".

Continues Senator Kefauver: "I would like to second Mr. Velie's comments in this regard and say that I am personally very grateful to you for the fine cooperation and assistance you gave to our Committee."

That material was 90 per cent material that we obtained by intercepting telephone conversations. Much of it had to do with Frank Costello. Back in 1943, we were given the opportunity to intercept Costello's telephone conversations. I think we were on that wire for three or four months. Those intercepted conversations have been used, in the intervening 17 years, by 20 or 30 federal and state agencies. They have been invaluable in establishing the cast of criminal characters in the whole eastern part of the United States.

Costello would call Longy Zwillman in Jersey, the Moretti brothers. We obtained the details of his gambling ventures in Florida and Los Angles. It was all set out there so that Kefauver and the State Crime Commission

and the Federal agencies could look it over as they might look over a blueprint.

I have here a half dozen letters from Senator McClellan, thanking our office for the cooperation we gave the Senate Select Committee on Improper Activities in the Labor or Management Field and a dozen more from his counsel, Robert Kennedy. We have other acknowledgments from many House and Senate committees, thanking us for information that we obtained by reason of this invaluable investigative device.

The Chairman: Mr. Hogan, pardon me for interrupting a very enlightening statement. Would you mind if we make copies of those letters to which you have referred just now and make them a part of our records?

Mr. Hogan: Certainly not. They do get voluminous, though, and contain some references to particular matters that should not presently be made a matter of general public record. I'll send over photostats of several as samples, if that will be satisfactory. However, of course all will be available for the Commission's inspection.

The Chairman: We will consider those photostatic copies together as Commission Exhibit 3.

Mr. Hogan: However, no matter what we may think about the intent of Congress in 1934, we are faced with this Benanti opinion. That has been the law since December of 1957 in this country. Therefore, the district attorneys of the State of New York and the National Association of District Attorneys, represented here this morning by Edward Silver, District Attorney of Kings County, who is the President of our National Association—both associ-

ations have urged that Section 605 of the Federal Communications Act be amended in order to legalize the full use of wiretapping by state law enforcement officials, when acting pursuant to court order.

Although we still lack such Federal legislation, it has been our understanding that we are free to intercept communications, under such conditions as are permitted by state law, for investigative purposes. Section 605 makes it a Federal crime to intercept, but it adds the words "and divulge such intercepted communications".

It has long been the position of the United States Attorney General and the Federal Bureau of Investigation that no Federal crime exists unless both elements are present, that is, interception and divulgence.

No Federal case, prior to this year, has held that when a wiretap is used in our state courts, having been obtained under proper state procedure, that such use constitutes criminal divulgence.

However, on February 11th of this year in the case of Pugach against Dollinger*, the United States Court of Appeals for this Circuit issued a temporary restraining order, barring the district attorney in Bronx County from divulging wiretap information in the trial of a criminal action pending in that county.

The case, you will recall, was one involving the partial blinding by acid of a young girl, allegedly committed by a rejected suitor, the defendant. This matter is presently

---

* 275 F. 2d 503 (2d Cir. 1960), (temporary injunction granted); 277 F. 2d (2nd Cir. 1960) (permanent injunction denied), *cert. granted*, 363 U. S. 836 (1960).

under consideration by the Circuit Court, so I don't want to discuss the case.

But I can say—and I have a memorandum here from my chief assistant—how this affects my particular office.

"If this Federal ruling is upheld, it will prevent the prosecution of the following indictments", and ten indictments are listed, largely in the field of organized crime and official corruption. My chief assistant adds: "At least six major investigations, currently being conducted by the Rackets Bureau, will become unproductive if this ruling is sustained. It will have the practical effect of putting an end to these investigations".

Now, in reliance on this Pugach opinion, a judge of the Court of General Sessions on March 7th of this year came down with an opinion in support of his position refusing to sign any further orders authorizing wiretaps.

This was done in the face of the express provision in our State Constitution and the section of our Criminal Code authorizing wiretapping as a proper tool of law enforcement in New York State.

Incidentally, it is also interesting to note that the Chief Justice of our State Court of Appeals said the other day that wiretapping under a competent court order, is still lawful in our State courts, unless and until the Federal courts say that we can't do it.

Commissioner Grumet: Where did he make that statement?

Mr. Hogan: The Presiding Judge of the State's highest court said that while being interviewed on WRCA-TV Searchlight, as reported in the New York Times of March

28, 1960. That is reminiscent of what Justice Fuld said in his dissent in the Broady case.* He concluded his dissent in that case by saying. "Nevertheless, until the Supreme Court has spoken more decisively on the subject, I hesitate to say that Congress has, through Section 605, preempted the field so as to supersede and render ineffectual the provisions of the State Constitution and Code of Criminal Procedure which authorize wiretapping".

The result of all this, obviously, has been to place the conscientious prosecutor in a dilemna. On the one hand, he is sworn to do his duty by unearthing evidence of crime and by prosecuting criminals and to use all of the weapons that are in his legal arsenal to do just that. One of the most important of these weapons certainly is legal wiretapping. But if that key weapon is used, the prosecutor may find that by so doing he violates Federal law.

Well, this is completely repugnant to all prosecutors. We are not only obligated to uphold the law but we feel a moral compulsion to uphold respect for the law and, when it comes to abiding by the law, we want to and we should be setting the example. But here we are placed in this awkward position where, on the one hand, we want to do our duty and, on the other hand, we would appear to be violating Federal law.

Moreover, this creates a dilemma for the federal prosecutor. Should he prosecute state judges, district attorneys, police, for carrying out that duty which is enjoined upon them by state law and which assists in that fight in which he too has his place, the fight against crime?

---

* *People* v. *Broady*, 5 N. Y. 2d 500 (1959), *appeal dismissed*, 361 U. S. 8 (1960).

Testimony of Hon. Frank S. Hogan Before the New York State Commission of Investigation

Well, to help to resolve this dilemma, it seems to me, as your Chairman stated earlier, that we must amend Section 605 of the Federal Communications Act.

And, by way of digression, before concluding—I am sorry to have taken so much time—I want to point out what I think is an interesting paradox.

One of the principal scourges that law enforcement is battling in New York State is narcotics. In this battle the importers and the wholesalers often so insulate themselves that, although they make delivery and sale arrangements, they never touch the stuff, they never touch the contraband.

Telephone taps, along with painstaking investigation, may help to make a case. Our State, with more than 40 per cent of the nation's narcotics addicts, can trace a large portion of our crime load to this addiction.

Practically all narcotics addiction in this State is heroin addiction and under both Federal and State law heroin has absolutely no legal use. All heroin is illegal under all circumstances, and absolutely no heroin originates in the United States. Every last ounce of it is imported from abroad.

If our Federal Government had adequate funds and manpower devoted to the successful enforcement of the Federal Narcotics Law and Customs Procedures, and if perfection were possible, it would be impossible to buy as much as a single two-dollar shot of heroin in New York. Our narcotics problem wouldn't exist.

But, of course, in spite of excellent efforts on the part of Federal agents with inadequate budgets and personnel, such perfection is impossible.

Testimony of Hon. Frank S. Hogan Before the New York State Commission of Investigation

Incidentally, when the State district attorneys urged that Federal funds be expended to create a major narcotic hospital in this state so that addicts could be dealt with here as a social and a health problem, rather than as a criminal problem, we found out and were told that the United States Department of Health, Education and Welfare deemed narcotics addiction a local problem.

All right, so it is a local problem! This poses an interesting paradox. One of the main causes of crime in this State exists because the Federal government has failed in its efforts to stop the importation of heroin—through no fault of the excellent but inadequate staff assigned to the task, I hasten to add. Yet, when we seek Federal assistance in setting up a health program to deal with the scourge, we are told that it is a local problem and that, therefore, appreciable Federal help will not be forthcoming.

Likewise, when the state seeks to utilize reasonable methods to exercise its own police power to deal with narcotics and connected criminal activities, we are not given reasonable leeway in exercising that police power. Rather, a Federal statute is interpreted as precluding the exercise of a most important tool of such police power.

Now, reverting to the dissent by Judge Fuld for just a moment, he says: "Nevertheless, until the Supreme Court has spoken more decisively on the subject"—. Well, I, for one, am pretty pessimistic about what the Court ultimately will say. I think the opinions of the Court indicate its temper. It should surprise nobody if the Court hold as conclusively as it did in the Nelson case* that the Congress of

---

* *Pennsylvania* v. *Nelson*, 350 U. S. 497 (1956).

the United States has preempted this area and we are forbidden to engage further in the interception of telephonic communications, in spite of our own Constitution and laws.

So it seems to me that the solution is to maximize and channelize our efforts in order that we may get relief in Congress and the simplest form of relief is an amendment of Section 605.

You get into all sorts of difficulties if you try to arrange a legislative scheme for the whole country. But if the present Congress would declare, in effect, that the 1934 Congress did not intend to preclude this exercise of state police power, we would have re-established the status quo, the status quo "ante Benanti", if you will.

That is, it seems to me, the quickest way we can resolve this dilemma. And I can't think of a better way of concluding this presentation, because I think it sums it up so well, than by quoting Senator McClellan. He made a statement, when he submitted a bill on January 16, 1958 to amend Section 605 of the Communications Act of 1934. I think that statement is an admirable summary of our concern and our hope in this area.

Senator McClellan said at that time, "I am introducing a bill amending Section 605 of the Federal Communications Act to clarify the rights of State law enforcement agencies to use wiretaps to uncover evidence as to the commission of serious crimes. When it is referred to the Judiciary Committee, I shall press for its early approval.

"The Supreme Court in its recent decision in the Benanti case ruled that wiretap evidence obtained by State officers under authority of State law was inadmissible in

Testimony of Hon. Frank S. Hogan Before the New York State Commission of Investigation

the Federal courts. The language of the decision has left a cloud on the right of the States legally to authorize law enforcement agencies to obtain court warrants to intercept communications in cases where there are reasonable grounds to believe that these agencies would uncover evidence of serious criminal activity.

"The Court did not rule on the constitutional questions. Its decision was based solely on an interpretation of the intention of Congress when it passed Section 605 of the Federal Communications Act of 1934. This Court decision has given me much concern over the effect it would have on law enforcement and prosecution of serious crimes.

"It is my belief that Congress never intended to cripple and hamper law enforcement agencies in their efforts to stamp out crime and punish criminals.

"As Chairman of the Senate Select Committee Investigating into Improper Activities in the Field of Labor and Management, and as a member of the Judiciary Committee, I am cognizant of the problems facing prosecutors and enforcement agencies in their consicientious efforts to eliminate crime and to punish the criminals, particularly the organized criminal syndicate rings engaged in widespread criminal rackets, such as labor racketeering, narcotics, bribery and extortion rings.

"The detection, investigation and prosecution of crime, particularly organized crimes, will be seriously handicapped and weakened. In many cases, prosecution and investigation of crimes would be completely thwarted and would collapse were wiretapping to be denied to the law enforcement agencies.

Testimony of Hon. Frank S. Hogan Before the New York State Commission of Investigation

"When the Select Committee launched its investigation into the labor situation in the New York area, it did so unaware of the extent that racketeers had penetrated the Teamsters Union and certain other branches of organized labor in the nation's largest city.

"The Committee and I believe the public was shocked at its revelations. What was portrayed was a picture of ruthless gangsters, led by Johnnie Dio and Anthony "Ducks" Corallo, joining in an alliance with Jimmy Hoffa to seize control of the transportation industry in the nation's largest and richest city.

"The control of this strategic economic area by unscrupulous gangsters presented, and continues to present, a threat to the economic security of this country.

"This conspiracy could not have been presented in such clarity without the use of intercepted telephonic messages which were made available to this Committee through permission of the New York State Supreme Court and the offices of the New York County District Attorney.

"Congress has never intended to permit the criminal to use the means of modern communication with impunity by enjoining law enforcement agencies from intercepting his communications. To accept such interpretation would mean that Congress intended to give criminals free license and encouragement to use communications without fear or handicap.

"It is an interpretation that I cannot accept. In the field of criminal detection and prosecution, the law enforcement agencies are constantly waging a war against criminals who attack society. To do so effectively, it is necessary and essential to intercept their communications.

"Many states, such as New York State, have enacted laws to enable their enforcement agencies to intercept communications under proper safeguards and to eliminate the dangers of promiscuous and improper use.

"In New York, for example, enforcement agencies must apply to the court of highest original jurisdiction for a warrant to permit the interceptions. This warrant is only granted when the court is satisfied that reasonable grounds exist that evidence of crime will be obtained as a result of the wiretap.

"This bill", referring to Senate Bill 3013, "This bill", concluded Senator McClellan, "sponsored by myself and Senators Ives, Ervin, Mundt, Goldwater and Curtis, is to clarify the effect of Section 605 and to assist State law enforcement agencies to give back to the States the right under proper statutory provisions to investigate and prosecute criminals."

That statement most admirably summarizes what we have in mind. The bill was introduced. It died somewhere in committee. I think our best hope—if we are seeking a solution to this problem, and a solution must be found—is to see to it that this bill, or one very similar to it, is reintroduced in this Congress and utilize our combined efforts to see that it is passed.

Thank you very much for your gracious attention.

The Chairman: Thank you very much, Mr. Hogan.

There may be just a few very brief questions that some of the Commissioners may have. I have only one and perhaps you have covered it, but I just want to make it clear for the record and for my own satisfaction.

Testimony of Hon. Frank S. Hogan Before the New York State Commission of Investigation

Under the law of New York State as at present constituted, with regards to wiretapping, can a private investigator or any other private citizen, under any circumstances, obtain a court order for intercepting a telephone conversation ?

Mr. Hogan: No. He might make application, but he wouldn't get the order.

The Chairman: There has never been such an order granted, as far as you know, is that correct?

Mr. Hogan: Never. That would be true also of eavesdropping, eavesdropping or the interception of a telephonic message.

Commissioner Lane: The only question I have is that it appears there are certain elements in the Congress that do not look upon this problem of wiretapping as we do. In other words, you recall on our visit to Washington a few weeks ago that there was some talk, in that conference with all the New York legislators, about some of the members of Congress from different sections of the country having rather strong feelings against wiretapping.

If you had a mandatory sentence for illegal use of a wire tap, would that influence some of those recalcitrant Congressmen and Senators towards being more favorable to us with reference to this particular bill.

Mr. Hogan: It seems to me a little removed. I would suppose that most courts would inflict a sentence in such a case. To make it mandatory might be a help with some persons, but I think the legislators that you have in mind would not come over to our point of view if that additional bit were put in. And that is why I think it would be much

more difficult to introduce and get passed a bill which would sanction the interception of telephone conversations in the Federal Government arrangement.

There would be persons representing rural areas, perhaps, who are not aware of the problems we have to face in metropolitan areas, who wouldn't appreciate the arguments which I have tried to present this morning.

But you might have more success in simply amending the Federal Communications Act, the legislative contention being that Congress had no will to preclude this and no desire to interfere with state police power.

Commissioner Lane: In other words, just to make it clear that the states can pass their own laws in this particular area.

The Chairman: Mr. Hogan, this Commission is exceedingly grateful to you for carrying the ball on the first play, so to speak, and telling us in such emphatic terms and such convincing terms of the importance of wiretapping as a weapon, especially in the field of organized crime and corruption. And we are exceedingly grateful to you for giving us your time and giving all the thought you have to this wonderful presentation.

Thank you.

Mr. Hogan: Thank you, very much.

I am grateful to you and the Commissioners for giving me the opportunity.

The Chairman: We will take a two-minute recess.

(Short recess.)

* * * * *

Testimony of Police Commissioner Stephen P. Kennedy, City of New York, Before the New York State Commission of Investigation

The Chairman: The next witness at this public hearing will be the Commissioner of Police of the City of New York, Mr. Stephen P. Kennedy.

Mr. Kennedy, just as a matter of record and background, will you briefly tell us about your experience, your past experience in the area of law enforcement?

Mr. Kennedy: I was appointed patrolman in the Police Department, City of New York, in 1929. I have worked in various branches of the Police Department and have held various ranks successively up to and including that of Chief Inspector. On August 2, 1955, I was appointed Police Commissioner.

I am a member of the Bar of this State, in Federal Districts, Circuit Courts, and admitted to practice in the Supreme Court of the United States.

The Chairman: Please give us your views on this important problem we are considering here today.

Mr. Kennedy: Mr. Chairman, gentlemen of the Commission:

I am very happy to accept the invitation of this Commission to appear and urge as forcefully as I possibly can that the people of this State and the Governor be informed of the plight of law enforcement officials in combatting organized crime because of the uncertainty that now exists in the law concerning Court-authorized telephonic interception.

Now, at the outset, we must recognize the fact that when a criminal act is committed, not only are the civil liberties and rights of the immediate victim or his family or his associates—not only are they violated, but the liberties and

rights of all of us are threatened. Consternation, alarm, fear, are created in the community by the criminal act, and the public peace is disturbed.

If we blind ourselves to this basic premise, we ignore the purpose of public law. In a democracy public law is a creation of the people to protect them in their rights and liberties. It is not a rigid, inflexible code, but a reasonable, pragmatic approach by which the people protect their rights and liberties, and they do that in a way to meet changing conditions brought about by changing times, and they enact such legislation to protect them from the tyranny of the few. We must accept this if we are going to accept the basic premise of public law and the protection of our liberties and rights.

In my view it is of the utmost importance for the safety and welfare of the people of this State and this nation that the present session of the United States Congress shall be importuned to enact legislation authorizing State law enforcement officials to bring criminals to justice, pursuant to the terms of our State Constitution, by using Court-authorized telephonic interceptions under reasonable safeguards.

In a discussion of this problem, two facts must be constantly kept in mind: The first is that it is essential to protect the people from unauthorized invasion of their privacy through the medium of intercepting communications. The second is that law enforcement authorities must have the right, in appropriate cases, to use interception devices within reasonable limits, in the never ending war against crime and criminals.

Testimony of Police Commissioner Stephen P. Kennedy, City of New York, Before the New York State Commission of Investigation

The difficult task of detecting and preventing crime must be carried out in the framework of maintaining the civil liberty of the individual. No doubt we could attain greater success in crime prevention if we ignored civil rights, but this is too high a price, and no person, and I know of no law enforcement agency, which would be willing to pay that price.

On the other hand, we should be equally reluctant to accept unbridled individual freedom without regard to the adverse effects upon our nation as a whole. This would result in disproportionate protection for the criminal, with almost total disregard for the civil rights of the victims of vicious criminal acts.

In 1938, the people of the State of New York voted for and ratified, after a great discussion, our Constitution, which embodied a provision for the issuance of ex parte orders for the interception of telephonic communications where reasonable grounds existed for the belief that evidence of crime could be obtained thereby.

In 1942, this provision was implemented by the enactment of Section 813 of the Code of Criminal Procedure. This statute set up procedural safeguards for the issuance of such orders to law enforcement officers. It provided that the person whose conversation was to be intercepted, as well as the line over which the communications would be made, had to be described. The order would remain in effect for not more than 60 days. The reasons on which the necessity for the interception were predicated, and the results of the interception, are required to be explained to the court.

The highest Court in this State has consistently sustained the validity of our State constitutional provision.

No court—state or federal—has ever held that the practice in New York State is in conflict with any provision of the United States Constitution.

The dilemma that law enforcement in this State now finds itself arises from an interpretation of Section 605 of the Federal Communications Act, which prohibits the interception and divulgence of the contents of any telephonic communication. This section was passed by the Congress of the United States in 1934. When our State constitutional provision was enacted in 1938, no one for a moment considered that it was in conflict with Section 605 of the Federal Communications Act.

Indeed, cases that went to the Supreme Court of the United States thereafter—Schwartz against Texas, for example, and People against Stemmer,* a New York case—affirmed convictions based on the reception into evidence of Court-authorized telephonic interceptions in State proceedings.

However, there was a discordant note in United States Supreme Court decisions which stated in effect that state law enforcement officers who intercepted telephonic communications, even pursuant to the organic law of their state, were in violation of federal law and subject to federal prosecution. This is an untenable situation for law enforcement officers.

It is not only unfair, but it is demeaning and stultifying for police officers to place their careers and personal liberties in jeopardy by making State authorized interceptions. This chaotic condition must be corrected.

---

* 298 N. Y. 728 (1948), *affirmed*, 336 U. S. 963 (1949).

Testimony of Police Commissioner Stephen P. Kennedy, City of New York, Before the New York State Commission of Investigation

It is patently clear that the beneficiaries of the confusion presently existing in the law are those engaged in crime. It is the great majority of law-abiding people who will suffer. Increased criminal depredations by which the overlords of the underworld obtain a greater strangle hold on our economy through the further extension of their grasp on the body politic and the business world will, I believe, inevitably follow.

Just recently a new problem has been added to the morass of confusion in the law. Criminal prosecutions in which court-authorized telephonic interceptions are expected to be used are now faced with the fact that the defendants immediately make application to the Federal Court to restrain the introduction of the testimony into evidence, although this evidence is admissible under the State Constitution and statutes.

It is most difficult to comprehend why judicial decision should strip the arsenal of law enforcement of this weapon at a time when crime is on the increase.

Much misinformation on the subject of telephonic interception has become prevalent, and unfortunately the misconceptions are generally accepted as facts. A prejudice has been created because of an unclear understanding of the problem. The result has been that law enforcement officials, in an attempt to clarify the matter, have been reduced to tilting with the windmills of hearsay, rumor, and unreasoning fear.

As you know, the City of New York is comprised of approximately eight million people, who use 3,775,000 telephones. Over an eight-year period, between 1952 and 1959,

the New York City Police Department obtained an average of 290 Court Orders per year. These figures, it must be realized, represent the City wide totals, and come to less than 60 a year for each borough. This is in sharp contrast to the allegations that thousands of wiretaps are made by the police in this City each year. Certainly nobody could reasonably say that this is wild and indiscriminate use of telephonic interception.

Abuses of our civil liberties by private individuals in the field of telephone and dictaphone interception were demonstrated in the course of hearings conducted by a Joint Legislative Committee of this State. Law enforcement agencies, including the Police Department of this City, strongly urged that those abuses be curbed. Legislation to this end was supported by the Police Department of this City and was enacted.

Obviously, a clear understanding by the people and the Congress of the problems confronting law enforcement agencies is an immediate necessity.

Great strides have been made in the fields of science and communications. The underworld has not failed to take advantage of every technical advance in this field, and it is vital today that law enforcement must be given strong support in coping with modern crime.

Some people have been quoted as saying that police officers should shadow and tail criminal suspects and thus eliminate the need to intercept telephonic communication. Well, I think it is quite obvious that mere shadowing or tailing is a rather primitive method of criminal investigation in this day and age when we realize the vast increases

or advances made in technology. Today a man can step in a jet plane and be on the West Coast in a matter of hours. He can pick up a telephone and call Rome, Naples, the Far East, the Near East, in a matter of minutes.

The concept that telephonic interception is unnecessary and undesirable stems primarily, I think, from the normal conditions of society at the time the Constitution was adopted. But conditions have changed since 1789, and other periods which are usually cited. In the early days we lived in a rural, agrarian economy. People were rooted to their community. The law enforcement officer, the Sheriff, knew with whom he was dealing. He generally could reach out and find the perpetrator of a crime. In small communities there was a cohesiveness and interest in the community that supported the law enforcement officer. Should the perpetrator be successful in getting on a horse and galloping off in the hills, he couldn't get very far. Today the picture has changed. We are in an entirely different environment culturally and technologically, and we must recognize that fact and not impose upon law enforcement agencies the restrictions that were prevalent in a period so totally dissimilar to our own.

I believe that every reasonable and modern investigative technique must be employed legally against the criminal.

The late Robert Patterson, former President of the City Bar Association, former Federal Judge, and former Secretary of War, expressed that, I think, very admirably. He said:

"The underworld to today would rate Jesse James a small-fry amateur. Crime has become big business, with

campaigns planned and organized like operations in legitimate big business, with a structure of chief executives, fiscal departments, legal departments, public relations and the rest. Advantage has been taken of the most modern methods in business organization, swift communications and swift transportation. Advantage has been taken of the lagging organization of government. Law enforcement systems operating along lines good enough for 1851 or 1901 are too slow for the swifter pace of the times we are living in."

In the field of industrial racketeering, for example there are contacts and meetings with victims for the purpose of perpetrating extortions. Industrial racketeering leads to increased costs in consumer goods. Frequently, the victim does not complain. He is engaged in the competitive business field, and in any case he can pass the added cost on to the consumer, the people who ultimately pay the price of the crime. The victim frequently is merely a middleman and is not out of pocket. For this and for other reasons, he makes no complaint.

Law enforcement agencies do from time to time receive anonymous complaints, but no sworn testimony acceptable in court. Since the victim is invariably reluctant, as I said before, to come forward and give evidence, it must be flushed out with every available weapon, including court-authorized interceptions.

In a substantial number of investigations and prosecutions, the investigative technique of court-authorized interceptions is an indispensable weapon.

Testimony of Police Commissioner Stephen P. Kennedy, City of New York, Before the New York State Commission of Investigation

Senator McClellan, Chairman of the Senate Select Committee, investigating into improper activities in the field of labor and management, and a member of the Judiciary Committee, said:

"In many cases, prosecution and investigation of crimes would be completely thwarted and would collapse were wiretapping to be denied to the law enforcement agencies. . . . Congress has never intended to permit the criminal to use the means of modern communication with impunity by enjoining law enforcement agencies from intercepting his communications. To accept such interpretation would mean that Congress intended to give criminals free license and encouragement to use communications without fear or handicap and—grant these criminals a 'privileged sanctuary.' . . . In the field of crimnal detection and prosecution, the law enforcement agencies are constantly waging a war against criminals who attack society. To do so effectively it is necessary and essential to intercept their communications."

The District Attorneys of the five counties of New York City, with whom I am in frequent communication and consultation, working in close coordination with the Police Department, have used court-authorized telephonic interceptions with great success in all types of criminal investigations. This weapon is particularly important in the investigation of corruption in public office. The Police Department has used telephonic interceptions to bring to justice corrupt and venal members of the police force itself. Permit me to give you a few examples:

Testimony of Police Commissioner Stephen P. Kennedy, City of New York; Before the New York State Commission of Investigation

The use of authorized interceptions during a Departmental investigation of three notorious burglars disclosed that a member of the Police Department was in league with them. Subsequently, all the culprits, including the police officer, were arrested and convicted. It would have been impossible to have made out a case against any of them without the aid of telephonic interception.

In another case, two members of the Police Department were prime participants in crimes involving assault, robbery, and their receiving of stolen property. Similarly, in this case, the telephonic interception resulted in the obtaining of evidence which led to their arrest and conviction.

Another case in this category concerned a 70-year-old man who was viciously beaten and robbed. Police investigators, employing court authorized telephonic interception, were able to identify and to arrest the persons responsible, including a member of the Police Force. All were later convicted. Here again, it would not have been possible to establish their involvement in the crime were it not for the use of telephonic interceptions.

I could go on. I am certain that you recall that court-authorized telephonic interception was used extensively in breaking up several rings of conspirators who had wormed their way into professional and collegiate basketball and football. Their stock in trade was the corruption of our college youth engaged in the games mentioned by offering them easy money in return for setting up betting coups.

Many narcotic prosecutions of substantial quality would not have been possible without the evidence obtained as a result of legal telephonic interceptions.

Testimony of Police Commissioner Stephen P. Kennedy, City of New York, Before the New York State Commission of Investigation

Congressional Committees investigating the narcotics traffic, labor racketeering, and juvenile delinquency have made use of evidence uncovered as a result of court-authorized interceptions in this State. Investigations conducted by the Kefauver Committee, and more recently by the McClellan Committee, are two instances which immediately come to mind.

The December 1957 Queens County Grand Jury and the New York County Grand Jurors Association have strongly recommended that law enforcement officers be permitted to continue using telephonic interceptions pursuant to court order.

In May 1958, Senator Kenneth B. Keating of New York stated:

"Congress never intended to prohibit State officials from tapping wires when authorized by State law. . . . The State-authorized wiretapping approval by Congress would be especially helpful in New York State, which for some time has made careful and effective use of its wiretapping laws. Since many of the kingpins of organized crime in America operate in and out of this State, and the drive will be initially concentrated there, use of wiretapping by State officials can be of inestimable help. I would estimate conservatively that over half of the 100 top hoodlums sought by the Justice Department have their roots in the Empire State. Proper wiretapping can help wipe out the power of invisible government which has infected portions of the State."

Testimony of Police Commissioner Stephen P. Kennedy, City of New York, Before the New York State Commission of Investigation

On January 20, 1958, the New York Times in an editorial stated:

"The sensible resolution of this conflict between the rights of the individual to privacy and the right of society to protection against infamous crimes seems to have been achieved in practice in New York, where wiretapping has been legal under the laws and Constiution when carried out by law enforcement officers under judicial restraints."

It is manifestly inefficient to impose duties and obligations on law enforcement officials while failing to supply them with the necessary tools which they must use to do the job. Judicial decisions on the Federal level not only prune the sick leaves from the tree but sever the healthy branches as well.

It is the people of the State who are prejudiced by the present rule of exclusion. The effect is to make arrests and successful prosecutions much more difficult, if not at times virtually impossible.

Prosecuting officials and Grand Juries should not be circumscribed in their endeavors to detect crime and bring criminals to justice.

Police officers should not face the possibility of arrest while attempting to carry out the law of the State.

Corruption in public office should not be made more difficult to discover.

Criminals should not be afforded this sanctuary.

The civil rights of the victims of crime should not be sacrificed for the benefit of those who threaten the civil rights of all of us.

Testimony of Police Commissioner Stephen P. Kennedy, City of New York, Before the New York State Commission of Investigation

In order to remove these unwarranted roadblocks to efficient law enforcement and greater public protection, the Police Department recommends that the present session of the United States Congress enact into law an exemption from the provisions of Section 605 of the Federal Communications Act for law-enforcement officers of the various states and its political subdivisions, while acting in compliance with state law.

In addition to that, there are several queries that I think ought to be proposed to the people. I can think, and I suppose you can too, of a number of cases which would fall within the provisions of 605. Let us consider whether, in this hypothetical case, Section 605 is applicable:

A child is kidnapped and the kidnapper, identity unknown to father, calls the father, warns him not to tell anyone else, demands ransom or death to the child. Mother intercepts message on another extension. Mother recognizes voice of kidnapper. Father complies with instructions. Money is paid. The child is found dead.

Would 605 prevent the divulgence of the mother's testimony? 605 says "no person, not being authorized by the sender". In this case, the sender said, "Don't tell anyone; don't tell your wife". He knows perfectly well if the wife hears his voice she will recognize him. She has not been authorized by sender to intercept any communication and divulge or publish the existence, contents, subject, purport or effect of the interception of the communication to any person.

Query: Does 605 prevent the introduction of this evidence in a Federal Court?

What if the interceptor were a Federal officer? A State Officer? What would be the effect of Section 605 then? Would it make a difference if the kidnapper were prosecuted in a Federal Court or a State court? I think the people of this State and this City and this Nation should think about this case, and I know there are many others that could be proposed in determining whether or not Section 605 is a realistic approach to the problems which confront not only law enforcement officers but the people of the City, State and Nation in the protection of their rights and liberties.

Thank you very much, gentlemen. I appreciate the opportunity of being here and I'm sorry if I took too much of your time.

The Chairman: You certainly have not taken too much of our time at all, because every word that you have spoken I think has meat and meaning, Commissioner.

I should like to ask you this question:

Isn't it true, at least it has been my experience, that people who are on the other side of public corruption—in other words, a fellow who offers or pays a bribe—can rarely be gotten to testify in that kind of a case, and in that kind of a case, as I think you have already indicated, it is frequently very important to be able to intercept telephonic communications?

Mr. Kennedy: Yes, that is quite right, because the bribe-giver is in cahoots with the bribe-taker. Frequently he doesn't want to pay the bribe if he can avoid it, but the overriding consideration is that he gets away with his illegal activity; hence he gives the bribe whether, it is de-

manded or extorted from him or given voluntarily. Therefore, being in pari delicto you are not going to have one testifying against the other. So you have to, by other independent means, make a break through in any matter of official corruption.

The Chairman: I think the examples you cited of members of your own Department are a powerful argument for the very thing you are trying to reach, the very conclusion you are trying to reach here, the conclusion that the public should be made aware of the importance of this sort of thing.

Commissioner Grumet?

Commissioner Grumet: You gave a very forceful illustration in that kidnapping situation. Now, as a matter of fact, if there had been interception of a telephonic communication between two of the people who were going to attend that meeting at Apalachin, New York—unfortunately, there was not, as far as I know—but if there had been, why, the authorities would not be able to disclose what transpired at Apalachin, New York; isn't that so?

Mr. Kennedy: That is my understanding of 605.

Commissioner Grumet: You also pointed out the speed with which we travel these days and how the picture has changed. The Apalachin, New York, meeting provides an illustration of the distant parts from which some of these fellows come, and they are in touch with one another.

Mr. Kennedy: The conditions under which people live today differ so radically from the past. Before the invention of the telephone—I can understand why some people look upon these modern gadgets as suspect, and so on, but we've got to meet the situation which we are confronted with today.

As I said before, the people enacting their public laws for their own protection do not set up an inflexible code of human behavior, but it is changeable to meet changing conditions.

Commissioner Grumet: Commissioner, am I right in saying—you referred to the McClellan Committee and the conversations that were introduced in evidence before that Committee—am I right in saying that some of those conversations that went into evidence before the McClellan Committee were between Johnny Dio in New York and Hoffa in Detroit? Am I right? Is that your recollection?

Mr. Kennedy: There were a number of principals involved in that case. I think the records are replete with—

Commissioner Grumet: My recollection is that Johnny Dio was talking to Hoffa in Detroit on a number of occasions, unless I am mistaken.

Mr. Lumbard, is that right?

Mr. Lumbard: That is correct.

Commissioner Grumet: Which is another illustration of the thing you were saying.

Mr. Kennedy: Yes. Here you have the Congress of the United States using—divulging, if you will—

Commissioner Grumet: Here you have these two people talking to each other from distant points.

Mr. Kennedy: Yes.

Commissioner Grumet: And apparently having business in common.

Mr. Kennedy: Another query might come to mind: was the Congress in violation of 605 when these remarks were published? Were they "divulged", within the meaning of that word as used in Section 605?

Mr. Lumbard: One such conversation between Hoffa and Dio was set forth in Part 13 of the McClellan Committee Hearings at page 5120.

Commissioner Grumet: Between Hoffa and Dio?

Mr. Lumbard: Yes.

Commissioner Grumet: Was Dio in New York and Hoffa in Detroit? I think they were. That is my recollection.

Mr. Lumbard: That may be. I don't think the record shows where the two persons were. However, it was a telephonic interception that came from the authorities of New York State, and the interception had been made pursuant to lawful—

Commissioner Grumet: It is a fact, isn't it, Commissioner, that racketeers and gangsters in New York are in constant touch with racketeers and gangsters in other parts of the country as far west as California, and also it is international in its scope?

Mr. Kennedy: I think—

Commissioner Grumet: And into narcotics?

Mr. Kennedy: I think that is a reasonable conclusion. I think there has been enough evidence adduced to indicate that.

Commissioner Grumet: Obviously, if the law enforcement officers are going to be prevented from intercepting some of those communications, they are going to be stymied.

The Chairman: Commissioner, as the chief law enforcement officer in the largest community in this country of ours, your word unquestionably carries great weight with us, and I am sure with the people of the State of New York, and the people of the entire country. We are grateful to you,

not only for appearing here but for the very forceful way in which you have brought to the fore the core of the problem that is faced by you and other law enforcement officers in the State of New York, and by this Commission in its effort to unearth facts regarding organized crime, regarding public corruption and other things that this Commission is interested in. I am very, very hopeful indeed, and the entire Commission is, that the words of people like you will bear such weight with the Congress.

Thank you very much.

Commissioner Grumet: May I add one word on behalf of not only the New York City members sitting here but also my colleagues from upstate, that we want to go on record as saying that we have a very fine Police Commissioner.

Mr. Kennedy: Thank you very much. I want to thank the Commission for giving me the opportunity to speak. This matter is not one that was treated lightly. It is a considered opinion about which I have thought for a great period of time, weighing on the one hand the rights and liberties of the individual, and weighing on the other hand the rights and liberties of the people. It hasn't been something that was just whipped up out of thin air. I have given it very, very grave consideration, and these are my opinions and I am happy for the opportunity to present them to you gentlemen.

The Chairman: Certainly, Commissioner, the desire for wiretapping under proper safeguards is not an attempt by you or your department to find an easier way to enforce the law?

Mr. Kennedy: Definitely not. I think it is a situation with which you are confronted. It is not an easier way. There is no alternative.

The Chairman: That is exactly what I believe.

Thank you very much.

Mr. Kennedy: Thank you, sir.

(A recess was taken.)

. . . . .

FILE COPY

Office Supreme Court, U.S.
FILED
DEC 22 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term 1960

No. 111

BURTON N. PUGACH,

Petitioner,

—against—

HONORABLE ISIDORE DOLLINGER,
District Attorney of Bronx County, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

GEORGE J. TODARO
Counsel for Petitioner
Office & P. O. Address
135 Broadway
New York 6, N. Y.

12 CASE PRESS INC., 82 Beekman St., N. Y.—BEekman 3-2905

TABLE OF CONTENTS

PAGE

AUTHORITIES CITED

Cases

Adamson v. California, 332 U. S. 46 ..... 9, 10

Barron v. Baltimore, 7 Pet. 243 ..... 9, 10
Benanti v. U. S., 355 U. S. 96 ..... 1, 5, 6, 11, 14, 15, 17

Cooper v. Aaron, 358 U. S. 17 2

Goldman v. United States, 316 U. S. 129 7

Hurtado v. California, 110 U. S. 516 9

Nardone v. U. S., 302 U. S. 379 ..... 2, 4
Nardone v. U. S., 308 U. S. 340 4

Olmstead v. United States, 277 U. S. 438 ..... 7, 8, 16
On Lee v. United States, 343 U. S. 747 7

Palko v. Connecticut, 302 U. S. 319 9

Schwartz v. Texas, 344 U. S. 199 ..... 5, 8
Stefanelli v. Minard, 342 U. S. 117 ..... 8, 10, 11
Stemmer v. People of the State of New York, 336 U. S. 963 17

Twining v. New Jersey, 211 U. S. 78 9

Weeks v. United States, 232 U. S. 383 9
Weiss v. United States, 308 U. S. 321 10
Wolf v. Colorado, 338 U. S. 25 ..... 9, 10

PAGE

Statutory and Constitutional Provisions

Federal Communications Act,
Sec. 605 ..... 2, 4, 5, 11, 12, 14, 15, 16

New York Constitution,
Art. 1, Sec. 12 6

New York Code of Criminal Procedure,
Sec. 813-a 6

United States Constitution,
Fourth Amendment 7, 8, 10
Fifth Amendment 8
Fourteenth Amendment 10

Miscellaneous

1 Beveridge, *The Life of John Marshall*, 364-480 ... 9

IN THE

Supreme Court of the United States

October Term 1960

No. 111

BURTON N. PUGACH,

Petitioner,

—against—

HONORABLE ISIDORE DOLLINGER,
District Attorney of Bronx County, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

The nature of the Respondents' opposition, the briefs filed as *amicus curiæ* by the Attorney General of the State of New York and that of the District Attorneys' Association of the State of New York in this case, suggests that an elaboration of Petitioner's position may be of assistance to the Court.

1.

The shocking feature of this case is that even after this Court rendered its decision in *Benanti* v. *U. S.*, 355 U. S. 96, prominent public officials of the State of New York, District Attorneys, and Attorney Generals, all members of the State and the United States Supreme Court bar,

come before this Court seeking this Court's blessing to continue criminal activities in violating a Federal Statute in which the Congress of the United States has promulgated the "ethical standards" for all the people of the United States (See *Nardone* v. *U. S.*, 302 U. S. 379).

It is more shocking that they seriously importune this, the highest Court of our land, to seek its approval and condonance of their continuous and willful violation of Section 605 of the Federal Communications Act. They seek to place this Court in the anomalous position of saying that to intercept a communication and divulge its contents, etc. is a violation of Federal Laws for which they can be sent to jail and at the same time ask this Court to say that it will not interfere with their right to do so no matter how often they violate Federal Laws. To adopt this strange legalistic course would be to make a mockery of a Statute passed by the Congress of the United States and bring disrespect to our Courts of justice.

At this point it might be appropriate to quote a portion of this Court's opinion in *Cooper* v. *Aaron*, 358 U. S., pages 17 and 18:

> "However, we should answer the premises of the actions of the Governor and Legislature that they are not bound by our holding in the Brown case. It is necessary to recall some basic constitutional propositions which are settled doctrine.
>
> Article VI of the Constitution makes the Constitution the 'supreme law of the land' in 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as 'the fundamental and paramount law of the nation,' declared in the

notable case of Marbury v. Madison, 1 Cranch 137, 177, that 'it is emphatically the province and duty of the judicial department to say what the law is.' * * * and Article VI of the Constitution makes it of binding effect on the States 'any thing in the Constitution or Laws of any State to the contrary not withstanding.' Every state legislator and executive and *judicial officer* is solemnly committed by oath taken pursuant to Article VI, Cl. 3, 'to support this Constitution'.

No state legislator or executive or *judicial officer* can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous Court in saying that 'If the legislatures of the several states may, at will, annul the judgments of the Courts of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery * * * ' United States v. Peters, 5 Cranch 115, 136. A Governor who asserts a power to nullify a federal court order is similarly *restrained*." (Italics ours)

Judge Waterman, in his concurring opinion in the Court below, based his concurrence in part on the following reasons (R. 46):

"* * * but I am not willing also to assume that a New York state trial judge will permit such evidence to be admitted over the objection of defense counsel. After all, New York state judges, as we, were bound when they took office, to support the Constitution of the United States; and they are fully cognizant of Article VI, Clause 2 thereof:

'2. This Constitution, and the Laws of the United States which shall be made in Pursuance

thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'

Schwartz v. *Texas*, 344 U. S. 199 (1952), and *Benanti* v. *United States*, *supra*, make clear, and all the opinions of the court in the present case recognize, that divulgence of the contents of a wiretap unless the divulgence is authorized by the sender will constitute a violation of Sections 605 and 501. It is therefore presumptuous to assume that any New York State trial judge will acquiesce to the commission of a crime against the United States in his presence in his courtroom by a witness testifying under oath."

In *Nardone* v. *U. S.*, 302 U. S. 379, at page 383, the Court stated as follows:

> "The answer to the question is one of *policy*. Congress may have thought it less important that some offenders should go unwhipped of justice than that the officers should resort to methods *inconsistent with ethical standards and destructive of personal liberty*." (Italics ours)

The underlying principle of §605 was further elaborated in the second *Nardone* case (308 U. S. at 340-341):

> "We are here dealing with specific prohibition of particular methods in obtaining evidence. The result of the holding below is to reduce the scope of §605 to exclusion of the exact words heard through forbidden interceptions, allowing these interceptions every derivative use that they may serve. Such a reading of §605 would largely stultify the policy

which compelled our decision in Nardone v. United States (302 U. S. 379), supra. That decision was not the product of a merely meticulous reading of technical language. It was the translation into practicality of broad considerations of morality and public well-being. This Court found that the logically relevant proof which Congress had outlawed, it outlawed because 'inconsistent with ethical standards and destructive of personal liberty.' 302 U. S. 379, 384. To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.' What was said in a different context in Silverthorne Lumber Co. v. United States, 251 U. S. 385, 392, is pertinent here: 'The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all.' See Gouled v. United States, 255 U. S. 298, 307. A decent respect for the policy of Congress must save us from imputing to it a self-defeating, if not disingenuous purpose."

This Court in *Schwartz* v. *Texas*, 344 U. S. 199, being confronted with an isolated *accomplished* violation of Sec. 605 ruled that Congress did not intend to write a rule of evidence for the state. However, under the *guise* of a rule of evidence we are confronted with a consistent and persistent violation of Sec. 605. Should this Court refuse to reappraise *Schwartz* then this shocking situation can best be remedied by injunctive proceedings. *Schwartz*, however, ruled that the state officers violated federal law when they divulged the intercepted communication. In *Benanti*

v. *U. S.*, 355 U. S. 96, counsel for this Petitioner was also the attorney for Benanti. The Solicitor General of the United States presented a thorough and learned brief in an endeavor to uphold the validity of the New York Constitution, Article 1, Section 12, and the New York Code of Criminal Procedure, Section 813-a. This Court, however, in *Benanti* stated at pages 104-106:

> "Respondent does not urge that, constitutionally speaking, Congress is without power to forbid such wiretapping even in the face of a conflicting state law. Cf. Weiss v. United States, 308 U. S. 321, 327. Rather the argument is that Congress has not exercised this power and that Section 605, being general in its terms, should not be deemed to operate to prevent a State from authorizing wiretapping in the exercise of its legitimate *police functions*. However, we read the Federal Communications Act, and Section 605 in particular, *to the contrary*.
>
> The Federal Communications Act is a comprehensive scheme for the regulation of interstate communication. In order to safeguard those interests protected under Section 605, that portion of the statute pertinent to this case applies both to intrastate and to interstate communications. Weiss v. United States, supra. The natural result of respondent's argument is that both interstate and intrastate communication would be removed from the statute's protection because, as this Court noted in Weiss, the intercepter cannot discern between the two and will listen to both. *Congress did not intend to place the protections so plainly guaranteed in Section 605 in such a vulnerable position.* Respondent points to portions of the Act which place some limited authority in the States over the field of interstate communication. The character of these mat-

ters, dealing with aspects of the regulation of utility service to the public, are technical in nature in contrast to the broader policy considerations motivating Section 605. Moreover, the very existence of these grants of authority to the States underscores the conclusion that had *Congress intended to allow the States to make exceptions to Section 605, it would have said so.* In light of the above considerations, and keeping in mind this comprehensive scheme of interstate regulation and the public policy underlying Section 605 as part of that scheme, we find that Congress, setting out *a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy.* Cf. Pennsylvania v. Nelson, 350 U. S. 497; Hill v. Florida, 325 U. S. 538; Hines v. Davidowitz, 312 U. S. 52." (Italics ours)

The authorities above cited are impressive. It is, therefore, clear that in *Benanti* this Court has held these constitutional and legislative provisions to be an invasion of a field preempted by the Congress.

When, nearly a generation ago, this Court sustained a federal conviction resting on wiretapped evidence obtained in violation of state law, Mr. Justice Holmes characterized the proceeding as "dirty business." *Olmstead* v. *United States*, 277 U. S. 438, 469, 470. The rule of that case, that wiretapping does not violate the Fourth Amendment's prohibition against searches and seizures, still stands, despite several subsequent opportunities to strike it down. See *Goldman* v. *United States*, 316 U. S. 129, 136; *On Lee* v. *United States*, 343 U. S. 747, 758, 762. Nor is there any present reason again to reach the constitutional issue: the case at bar can be disposed of under the statute.

Mr. Justice Holmes was "not prepared to say that the penumbra of the 4th and 5th Amendments covers the defendant." 277 U. S. at 469. His comment about "such dirty business" was evoked by the circumstance that what the federal officers did in *Olmstead* involved the commission of a crime under state law, and so he concluded (277 U. S. at 471) that "if we are to confine ourselves to precedent and logic, the reason for excluding evidence obtained by violating the Constitution seems to me logically to lead to excluding evidence obtained by a *crime of the officers of the law.*"

If we start from Mr. Justice Holmes' premise that a violation of state law by federal officers is "dirty business", then is it not far more reprehensible for state officials, members of this bar, district attorneys, and judges of the State Court, to aid and abet in the violation of federal laws and to violate their oaths to support the Constitution and the Laws of the United States?

2.

As heretofore indicated this Court should reexamine *Schwartz.* However, if this Court decides not to disturb the doctrine therein contained then this Court should exercise its equitable powers of injunction. *Stefanelli* v. *Minard,* 342 U. S. 117 is not to the contrary.

Involved in *Stefanelli* was an illegal search and seizure by state police and this Court's refusal to suppress, in a state prosecution, the evidence illegally seized by the state police, in violation of the Fourth Amendment.

Evidence obtained as the fruit of an unreasonable search and seizure is (subject to a qualification fully discussed below) inadmissible in a federal prosecution because of the Fourth Amendment's protection against unreasonable searches and seizures. *Weeks* v. *United States*, 232 U. S. 383. That Amendment by its own force limits all federal action. But the first eight Amendments which were adopted to curb the powers of the newly created Federal Government, and whose adoption was indeed the price exacted for ratification of the Constitution, do not bind the States: that proposition was first established in *Barron* v. *Baltimore*, 7 Pet. 243, in an opinion written by Chief Justice Marshall, who had himself been a participant in the ratifying process as a member of the Virginia Convention. See 1 Beveridge, *The Life of John Marshall*, 364-480.

Repeated attempts to make the provisions of those amendments bind the States, on the theory that the first eight amendments were included in their entirety within the Fourteenth Amendment, have been consistently rejected by this Court. *Hurtado* v. *California*, 110 U. S. 516; *Twining* v. *New Jersey*, 211 U. S. 78; *Palko* v. *Connecticut*, 302 U. S. 319. The last rejection, where the issue was extensively explored, took place only twelve years ago. *Adamson* v. *California*, 332 U. S. 46.

It is true that in *Wolf* v. *Colorado*, 338 U. S. 25, 27-28, the Court held that

> "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in the concept of ordered liberty and as such enforceable against the States through the Due Process Clause."

But the *Wolf* case did not purport to overrule the settled line of cases, from *Barron* v. *Baltimore* through *Adamson* v. *California*, or the principle that the first eight amendments did not limit the State *ex proprio vigore*. To the contrary, the Court said (338 U. S. at 26), "The issue is closed", and it affirmed a state conviction that rested upon evidence obtained by an illegal search.

Three propositions necessarily follow from *Wolf*.

First, the state officers who participated in the illegal search that turned up the evidence on which Wolf was convicted did not violate any federal law, using "law" in its broadest sense.

Second, the Fourth Amendment does not bind the States.

Third, the Fourth Amendment is not fully incorporated in the Fourteenth.

The federal command in the case at bar is found in a statute of general application, which applies to all communications, even those that are purely intrastate. *Weiss* v. *United States*, 308 U. S. 321. The scope of that statute leaves no room for interpretation. In *Stefanelli* the Court refused to exercise its equitable powers because of the many possible flanking attacks on the many constitutional issues that might be raised in the course of a criminal trial in the state courts. The Court in *Stefanelli* stated, at page 119, referring to *Wolf*, the following:

> "The security of one's privacy against arbitrary intrusion by the police—which is the core of the Fourth Amendment—is basic to free society. It is, therefore, implicit in 'the concept of ordered liberty' and as such enforceable against the States through

> the Due Process Clause * * * Accordingly, we have no hesitation in saying that where a State *affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment.* id at 27-28 There was disagreement as to the legal consequences of this view but none as to its validity.' We adhere to it." (Italics ours)

In the case at bar, the Respondents' position is that under the laws of the State of New York they are permitted to tap telephones, pursuant to an order of the Court. The State Constitutional provision, and the Code of Criminal Procedure, hereinabove cited, upon which they base their authority to tap telephones, is diametrically opposed to the provisions of Section 605. Therefore, if the logic of the Court, hereinabove stated follows, then the *Stefanelli* case differs from the case at bar and might give rise to constitutional considerations.

In *Benanti* v. *U. S.*, *supra*, the Court, at page 102, stated as follows:

> "Furthermore, confronted as we are by this clear statute, and resting our decision on its provisions, it is neither necessary nor appropriate to discuss by analogy distinctions suggested to be applicable to the Fourth Amendment. Section 605 contains an express, absolute prohibition against the divulgence of wiretapping. Nardone vs. United States, 302 U. S. 379, 382."

A perusal of the above leads to the foliowing distinction between *Stefanelli* and the case at bar. In *Stefanelli* (1) the state police in making an illegal search and seizure were not violating any federal law; (2) that the search and sei-

zure was an accomplished fact; and (3) the Constitutional Provisions and the Code of Criminal Procedure of the State of New York, permitting wiretapping, is in direct conflict with Section 605.

3.

The brief submitted by the Respondents seeks to becloud the issues by discussing the proceedings of a trial in the County Court of Bronx County knowing full well that under the rules of this Court the record of that proceeding forms no part of the record in this case. Further, the facts as alleged in Respondents' brief as to that trial in the County Court of Bronx County are, to be most charitable, not accurately set forth, and for this Court to consider the issues in that proceeding, a voluminous record of the pretrial and trial proceedings, would have to be incorporated in the record. As this trial took place subsequent to the federal proceedings herein in issue, it is apparent that the Respondents are wilfully violating the rules of this Court. To present issues *dehors* the record to this case is incompatible with proper judicial review of the issues to be determined by this Court, and as such, should be stricken from the brief filed by the Respondents.

The District Attorneys' Association of the State of New York, with their brief as *amicus curiae* also submitted an appendix of certain testimony given at a hearing before the subcommittee on the Constitutional Rights of the Committee on the Judiciary, United States Senate, and before the Commission of Investigation of the State of New York. It is respectfully submitted that this one-sided testimony, while proper in the respective committee, has no place in

the judicial review of the issues presented to this Court and should be stricken from the record.

In the interest of justice, however, Petitioner disputes the facts as set forth by the Respondents relating to the proceedings of the trial in the County Court. The United States Court of Appeals had issued an order on February 11, 1960, restraining the "using and disclosing wiretap evidence at the trial of Pugach in the County Court of Bronx County, New York, on the *two* indictments there pending against him" (R. 24).

Thereafter the order was unanimously clarified by the United States Court of Appeals sitting *en banc*. The opinion of Friendly, *J.*, appears in 280 F. 2d 521. It might be noted that Respondents' brief for some unexplained reason uses the word "enlarged" rather than "clarified"? The reason seems obviously that the clarification referred to the word "using" and did not enlarge the original order of February 11, 1960, as the Respondents would have this Court believe.

Despite the mandate of the United States Court of Appeals, the District Attorney on February 24, 1960, moved the indictment for the gun case for trial although the violation of the law occurred almost four months after the maiming charge is alleged to have taken place. Defense counsel was forced into trial unprepared. He moved the Court for a preliminary hearing to determine the leads obtained by the police as a result of the wiretapping of Petitioner's telephone. This brought in issue the mandate of the United States Court of Appeals enjoining the use made by the police of the overheard conversation. This motion was denied on three separate occasions.

During the trial itself it was established that a wiretap on the telephone of the Petitioner had been in existence, pursuant to an order of the Supreme Court of the State of New York, for a period of approximately four and a half months. This disclosure to the jury also violated Section 605 (see footnote 6, *Benanti* v. *U. S.*).

The Respondents' brief naively attempts to characterize this application for a preliminary hearing as a discovery proceeding to ascertain the evidence in the hands of the prosecution (Respondents' brief, page 16). Defense counsel offered to prove that on the day before Petitioner's arrest there had been a conversation on the tapped telephone that Petitioner was carrying a gun in his brief case and might hurt himself. To this offer of proof Respondents objected and the Court sustained the objection and would not allow this testimony in evidence.

Strangely enough the morning following that conversation the Petitioner was arrested while carrying his brief case in the lobby of his office building. Respondents are far from candid in their further recitation of the facts by suggesting that the County Court Judge, having no knowledge as to the proceedings in the federal courts, had been intimidated in postponing the sentence until November 9, 1960, a date to which the Petitioner himself finally requested that sentence be passed. Respondent fails to allege how or by what means the Judge was intimidated. The Respondent does not mention, however, that the Petitioner had been sent to Bellevue Hospital for mental observation. That the psychiatrist filed a report that the Petitioner was suffering from schizophrenia, paranoid type, and was found to be incapable of understanding the charges or making a de-

fense. That many hearings were held until that issue was determined.

Further the County Court had full knowledge of all federal proceedings at the time the gun indictment was moved for trial being advised by both the Respondents and Petitioner's attorney. The clarification order was brought to the attention of the Court on a motion to set aside the verdict of a jury based on the violation of the order of the United States Court of Appeals and on the violation of Section 605 when the jury, during the trial of the gun case, became cognizant of the existence of the wiretap on the Petitioner's telephone. *Benanti* v. *U. S.*, footnote 6. The Court agreed to adjourn sentence until the disposition of the maiming indictment.

Petitioner's counsel requested several adjournments of the sentence, but the Respondents objected and the Court finally set November 14, 1960, for sentence peremptorily against the Petitioner with the added admonition that it would not tolerate any further adjournment. In the light of this situation, as Petitioner had to be in Court on November 9, 1960, Petitioner's counsel suggested that the sentence be advanced to the 9th day of November rather than come back on the 14th day of November.

With respect to Respondents' contention that there was no proof that Respondents tapped Petitioner's telephone and divulged the information thus obtained to the Grand Jury and that the Respondents intended to use such evidence on the trial of the two indictments is without foundation in fact. The complaint alleged all these facts and as the sufficiency of the complaint was attacked by the Respondents' cross-motion the allegations in Petitioner's

complaint must be assumed to be true. The Court further heard oral arguments of counsel in open Court and the factual determination of the District Court and the United States Court of Appeals are binding on this Court. The Attorney General of the State of New York concedes these facts to be true on page 6 of his brief.

The District Attorneys' Association in their appendix sought to show the problems confronting the prosecutor of the State of New York. However, the evil sought to be avoided when Congress enacted Section 605 was the destruction of the right of privacy. Wiretapping is conducive to extortion, blackmail and intrusion almost into the recesses of the mind of the citizenry. It would lead to a police state. The danger is manifest in the case at bar where for a period upwards of four months every confidential communication over the telephone of a lawyer, his partner and associate has been overheard. Assuming *arguendo*, that a client called his lawyer on the telephone, relying on the confidential relationship of attorney and client, and divulges his participation in a crime or other immoral acts, the police tapping the telephone could use that information for police purposes or extortion. This carried further could apply to religious, political or social conduct of the sender of the communication which might expose him to blackmail or public ridicule.

Nearly a generation ago, Mr. Justice Brandeis predicted (dissenting in *Olmstead* v. *United States*, 277 U. S. 438, 471, 473) that—

> "Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for

the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet."

4.

The District Attorneys' Association of the State of New York in their brief as *amicus curiae* seeks to upset *Benanti* v. *United States, supra,* on the ground that the Court overlooked a prior decision of this Court in *Stemmer* v. *People of the State of New York,* 336 U. S. 963. This was a *per curiam* decision by a divided Court. The issues were not the same as *Benanti* and the failure of this Court to cite it, in the unanimous opinion of this Court in *Benanti,* does not of itself indicate that *Stemmer* was not taken into consideration. The contrary is more plausible.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the United States District Court and the judgment of the United States Court of Appeals should be reversed.

GEORGE J. TODARO
Counsel for Petitioner
Office & P. O. Address
135 Broadway
New York 6, N. Y.

SUPREME COURT OF THE UNITED STATES

No. 111.—October Term, 1960.

Burton N. Pugach, Petitioner, v. Hon. Isidore Dollinger, District Attorney of Bronx County, et al.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[February 27, 1961.]

Per Curiam.

The judgment is affirmed on the authority of *Schwartz* v. *Texas*, 344 U. S. 199, and *Stefanelli* v. *Minard*, 342 U. S. 117.

Mr. Justice Brennan would also affirm but solely on the authority of *Stefanelli* v. *Minard*, 342 U. S. 117.

SUPREME COURT OF THE UNITED STATES

No. 111.—October Term, 1960.

Burton N. Pugach, Petitioner, v. Hon. Isidore Dollinger, District Attorney of Bronx County, et al. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[February 27, 1961.]

Mr. Justice Douglas, with whom The Chief Justice concurs, dissenting.

In *Schwartz* v. *Texas*, 344 U. S. 199, a pawnbroker was convicted as an accomplice in a robbery. Records of his telephone conversations, gotten by police eavesdropping, were admitted in evidence against him during his trial in the state court. He claimed that evidence was inadmissible under 47 U. S. C. § 605.[1] This Court rejected that claim without even stopping to see if indeed there had been a violation of the federal statute. The rationale of that rejection was that, "Where a state has carefully legislated so as not to render inadmissible evidence obtained and sought to be divulged in violation of the laws of the United States, this Court will not extend by implication the statute of the United States so as to invalidate the specific language of the state statute." *Id.*, 202.

The later decision of this Court in *Benanti* v. *United States*, 355 U. S. 96, swept away that rationale, and

[1] ". . . and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . ." See *Nardone* v. *United States*, 302 U. S. 379; *Nardone* v. *United States*, 308 U. S. 338; *Weiss* v. *United States*, 308 U. S. 321; *Benanti* v. *United States*, *supra*; cf. *Goldstein* v. *United States*, 316 U. S. 114; *Rathbun* v. *United States*, 355 U. S. 107.

Schwartz v. *Texas*, *supra*, today stands alone as an aberration from the otherwise vigorous enforcement this Court has given to the congressional policy embodied in 47 U. S. C. § 605. For in *Benanti*, in setting aside a federal conviction, we held that the proscription of wiretapping contained in § 605 forbade wiretapping by an authorized executive officer of the State, acting under the explicit terms of a state statute and pursuant to a warrant issued by the state judiciary. "[K]eeping in mind [the] comprehensive scheme of interstate regulation and the public policy underlying Section 605 as part of that scheme, we find that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy." *Id.*, 105–106. It seems incongruous to me that this sweeping congressional purpose should now be held to make a detour around the precincts of a state court. This is especially true where, as here, officials have shown such an avid taste for violating the law. See Dash, Knowlton and Schwartz, The Eavesdroppers, pp. 68–69. In such circumstances, redress—other than by an exclusionary rule—against the criminal acts of those who bear the badge of the law is neither easy nor generous. Cf. *Wolf* v. *Colorado*, 338 U. S. 25, 41, 42–44 (dissenting opinion).

Yet today a majority of this Court summarily holds that *Schwartz* v. *Texas*, *supra*, is still the law, and petitioner is left only with the consoling knowledge that Congress *meant* to protect the privacy of his telephone conversations,[2] while the benefits of the congressional intendment are denied him.

---

[2] *Schwartz* v. *Texas*, *supra*, stands for no more than a refusal, as a matter of federal law, to void a conviction said to be based on wiretap evidence. The witness who divulges wire-tap information, is no less guilty of a federal crime. See *Schwartz* v. *Texas*, *supra*, 201. Nor, after *Benanti*, does the fact that New York purported to author-

Petitioner is charged, in a New York state court, with the commission of several serious crimes. His complaint in the instant proceeding alleged that "on or about June 15, 1959, and thereafter" agents of the District Attorney and of the New York police force tapped his telephone wires pursuant to a state court warrant and "obtained certain information." That information, and other evidence to which it led, was divulged to the grand jury, which indicted petitioner, and to the press. But more importantly there was the allegation that the "defendants intend to use the evidence obtained through the illegal use of the aforesaid illegal wire taps upon the trial" which petitioner imminently faces. The prayer asked that the defendants be enjoined "from proceeding . . . upon the indictments . . . on any grounds in which they may use wire tapping evidence, or on any grounds or investigations resulting from or instituted as a result of the aforesaid illegal wire taps."

There is no doubt that, once the wire-tap evidence is put in during the impending trial, petitioner is without remedy for the prejudice it does him in that trial, either in the state courts, *People* v. *Variano*, 5 N. Y. 2d 391, 185 N. Y. S. 2d 1, or, under *Schwartz* v. *Texas*, *supra*, in the federal courts.

In *Stefanelli* v. *Minard*, 342 U. S. 117, the petitioner was charged with a violation of the state gambling laws. He sought to enjoin the use, at his trial, of evi-

---

ize this police wire tap save it from illegality. See *In re Telephone Communications*, 9 Misc. 2d 121, 170 N. Y. S. 2d 84; *Matter of Interception of Telephone Communications*, 23 Misc. 2d 543, 198 N. Y. S. 2d 573. As I indicated in my dissent in *Schwartz* v. *Texas*, *supra*, 205, I am of the opinion that a wire tap is a search within the meaning of the Fourth Amendment, so that, in the absence of illegality under § 605, I would have to consider if the New York wire-tap procedure meets the constitutional test of reasonableness. But under § 605, *all* wire taps are forbidden.

dence obtained by a police invasion of his home, an invasion admittedly in violation of the command of the Fourth Amendment. Relief was denied in the exercise of equitable discretion, three factors being relied on. First, the petitioner, it was said, could show no irreparable injury, for, at worst, he would go to jail on the evidence sought to be suppressed. Second, it was supposed that the federal court was being asked "to intervene piecemeal to try collateral issues." Third, and overriding the first two, was the traditional reluctance of a federal court to meddle in state court proceedings, and especially in state court criminal proceedings.

The strongest expression of that reluctance is found in the general prohibition of federal injunctions "to stay proceedings in a State court." 28 U. S. C. § 2283. Although that provision bars an injunction operating on a party, after commencement of the state court proceedings, as well as an injunction directly against the state court, *Harkrader* v. *Wadley*, 172 U. S. 148; *Ex parte Young*, 209 U. S. 123, 161–162, it is not directly involved here. *Here the thrust of the relief is only to enjoin the use of wire-tap evidence, not to enjoin the action itself. Hence there is no bar to maintaining the action.* Cf. *Rea* v. *United States*, 350 U. S. 214. Where, as here, the relief sought is the adjudication of collateral matters which cannot be adjudicated in the state proceedings under state law, there is no occasion to invoke the statute. "That provision is an historical mechanism (Act of March 2, 1793, 1 Stat. 334, 335) for achieving harmony in one phase of our complicated federalism by avoiding needless friction between two systems of courts *having potential jurisdiction over the same subject-matter*." *Hale* v. *Bimco Trading Co.*, 306 U. S. 375, 378. (Emphasis added.) Hence I do not reach the questions that would

be raised if we had before us the alternative of enjoining the state action or withholding all relief.

Can the dangers of allowing this early resort to the federal court outweigh the wrong of subjecting petitioner to the risk of conviction and imprisonment on the strength of criminally obtained and criminally presented evidence? This is not a case where there is piecemeal resort from one court to another. This remedy is the only one which is available to protect a federal right.[4] It is not a case where an appeal is properly delayed, so that the asserted error may be seen in the context of the whole trial, as no review at all is available. For the same reason, this is no case

[3] 28 U. S. C. § 2283 provides for three classes of exception: (1) as expressly authorized by Act of Congress, (2) where necessary in aid of jurisdiction, and (3) to protect or effectuate its judgments. Cf. *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118. Injunction against the *commencement* of state court criminal proceedings has long been the first line of defense for federally secured rights. As respects federally secured civil rights see, *e. g.*, *Truax* v. *Raich*, 239 U. S. 33; *Pierce* v. *Society of Sisters*, 268 U. S. 510; *Terrace* v. *Thompson*, 263 U. S. 197; *Hague* v. *C. I. O.*, 307 U. S. 496; cf. *Douglas* v. *Jeannette*, 319 U. S. 157. As respects federally secured economic rights see, *e. g.*, *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86; *Cline* v. *Frink Dairy Co.*, 274 U. S. 434; *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497.

[4] Judge Clark, dissenting in this case below, said: "In sum it is beyond dispute that there is a general, indeed universal, custom of federal law violation. Now this is a distressing situation, made not less so that in the eyes of many worthy citizens it is required by the asserted exigencies of successful law administration. But it is not an unusual situation. For actually it is a clash between federal and state governmental policies. As such it is a recurring struggle in our history and quite possibly a necessary one to a federal form of government. In the past we have found ways of meeting and solving the problem. Of course there are several forms of remedy; but the one to which there seems continual return when other remedies fail is the resort to the equity powers of the federal courts to enjoin repeated violations of the criminal law." 277 F. 2d, at 748–749.

for the exercise of equitable discretion. If the federal question is not now protected, it can never become the basis for relief.

The doctrine of equitable discretion properly involves no more than a choice among remedies, an orderly management of judicial procedures. Doubtless there are times when equity should leave parties to their remedy "at law," *i. e.*, to their remedy in the ordinary course of the threatened proceeding. But once it is established that the other proceeding offers no remedy, the rationale of equitable discretion disappears. It becomes no more than the legal language which clothes the denial of a right in the guise of a mere procedural decision. Unless and until *Schwartz* v. *Texas*, *supra*, is overruled, the exercise of equitable discretion to deny preliminary relief from the threatened use of wire-tap evidence is wholly unjustified. Unless and until *Schwartz* is overruled, the beneficent effect of § 605 will be stultified by the admission of tainted evidence in state trials. The privacy of the individual, history assures us, can never be protected where its violation by state officers meets with reward rather than punishment.